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APPENDIX

Supreme Court of The United States

OCTOBER TERM, 1967

No. 639

MINNIE BRADE GLONA,
PETITIONER

versus

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY, ET AL

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1967
CERTIORARI GRANTED DECEMBER 4, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 639

MINNIE BRADE GLONA,
PETITIONER

versus

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY, ET AL

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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UNITED STATES DISTRICT COURT

Division B

Docket No. 15974

DOCKET ENTRIES

Mrs. Minnie Brade Glona

versus

American Guarantee & Liability Insurance Company and Henry O. Mac Donell

FOR PLAINTIFF:

MARVIN C. GRODSKY
LEONARD J. FAGOT
WILLIAM F. WESSEL
1605 National Bank of Commerce Building

FOR DEFENDANT:

MARGOT MAZEAU
NORMANN & NORMANN.
1605 Hibernia Bank Building
524-7604

Date	Filings and Proceedings
9/28/65	Flg. complaint. Issg. 2 summons.
12/27/65	Flg. motion of Defts. for summary judgment; notice, joint stipulation and memo attached.
6/22/66	Hearing and ORDER that motion of Defts. for summary judgment be, GRANTED. Ent. 6/24/66. Issg. notice.
6/24/66	JUDGMENT in favor of Defts. and against Pltf. dismissing Pltf's. suit with costs. Ent. 6/24/66. Issg. notice.

APPELLATE PROCEEDINGS

7/22/66	Flg. notice of appeal by Pltf.
8/26/66	Record forwarded to Court of Appeals.
7/27/67	Flg. Mandate from Court of Appeals; Judgment affirmed, Etc.
10/27/66	Docketing Cause, etc.
11/ 1/66	Flg. Appearance for Appellee.
1/ 3/67—	Flg. Three Xerox Copies of the Record. (FOR USE OF COURT). (SEND TO PANEL)
2/17/67	Flg. Brief on Behalf of Mrs. Minnie Brade Glona, Appellant with c/s (20 mimeo copies).
3/14/67—	Flg. Original Brief on Behalf of Appellees, American Guarantee & Liability Insurance Company and Henry O. Mac Donell c/s (20 printed copies)
4/ 4/67	Assigned for June 12, 1967 at New Orleans
6/12/67	Entg. Argument & Submission Before Hons. Rives, Dyer CJs. & Johnson DJ.
6/22/67	Affirmed "Per Curiam" (FMJ)
7/17/67	Judgment as mandate issued to Clerk, N. O., La.
9/14/67	Preparing & Certifying proceedings on Certiorari.
9/25/67	Flg. Notice (P. C.) of Clerk of S. C. as to the filing Petition for Certiorari.
12/. 8/67	Flg. Order of S. C. Granting certiorari and that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1]

COMPLAINT FOR DAMAGES

Filed: Sep. 28, 1965

United States District Court
Eastern District of Louisiana
New Orleans Division

No. 15,974
Civil Action — Division B

Mrs. Minnie Brade Glona

versus

American Guarantee & Liability Insurance Company
and Henry O. Mac Donell

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

The complaint of Mrs. Minnie Brade Glona does with respect aver:

I.

That plaintiff is a citizen of and resident of the State of Texas, that defendant American Guarantee & Liability Insurance Company is a foreign insurance com-

pany domiciled in the State of New York, having qualified to and doing business in this jurisdiction, and that defendant Henry O. Mac Donell is a citizen and resident of this state and jurisdiction; further that

The amount in controversy exceeds, exclusive of costs and interest, the sum of $10,000.00.

II.

That Bill E. Brade also known as Billy Glona was plaintiff's child and was, on September 15, 1964, the driver of an automobile stopped for traffic preceding him at the intersection of Gentilly Boulevard and Franklin Avenue, City of New Orleans, when an automobile owned and being driven by defendant Henry O. Mac Donell and liability-insured by defendant American Guarantee and Liability Insurance Company, suddenly, and without warning or cause [fol. 2] was forcefully driven into and struck the rear of the Glona vehicle, propelling it into the vehicle ahead.

III.

The said accident was caused by the reckless and negligent driving of defendant Mac Donell in failing to keep a proper lookout, following too close, speeding, and failing to maintain proper control over his vehicle and in violation of the provisions of MCS 828, Traffic Ordinance of the City of New Orleans, 1956, as amended and of the laws of the State of Louisiana, both of which are specially pleaded as if repeated in extenso.

IV.

In said accident Billy Glona was caused to strike his head on a portion of his automobile, sustaining a cerebral contusion resulting in his death on October 2, 1964. Decedent was, at the time of his death, 19 years old; having never married and leaving no children.

V.

Complainant avers damages as follows: Surviving claim of Billy Glona, $200,000.00; losses by complainant, $25,000.00.

WHEREFORE, plaintiff Mrs. Minnie Brade Glona demands judgment against American Guarantee & Liability Insurance Company and Henry O. Mac Donell, jointly and solidarily, in the sum of $225,000.00, legal interest and costs.

LEONARD J. FAGOT,
WILLIAM F. WESSEL, and
MARVIN C. GRODSKY,
Attorneys for Complainant.

(Signed) MARVIN C. GRODSKY
MARVIN C. GRODSKY,
Trial Attorney
1605 N.B.C. Bldg.,
New Orleans, Louisiana
523-6421

Marshall, please serve:

1. Am. Guar. & Lia. Ins. Co.
   thru: Secty. of State
2. Henry O. Mac Donell
   4433 Fiesta Drive
   New Orleans, Louisiana 70114

[fol. 5]

MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

Filed: Dec. 27, 1965

Defendants, AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY and HENRY O. MAC DONELL, move the Court to enter, pursuing to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendants' favor dismissing the action on the ground that there is no general issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

NORMANN & NORMANN
Attorneys for defendants
1605 Hibernia Bank Building
New Orleans, Louisiana 70112
524-7604
(Signed) MARGOT MAZEAU
MARGOT MAZEAU,
Trial Attorney

NOTICE OF MOTION

TO: Marvin C. Grodsky, Trial Attorney
1605 National Bank of Commerce Bldg.
New Orleans, Louisiana

PLEASE TAKE NOTICE that undersigned counsel will bring the foregoing Motion for Summary Judgment on for hearing before the United States District Court for the Eastern District of Louisiana, as soon as counsel can be heard, in the Federal Courts Building at 400 Royal Street in the City of New Orleans.

NORMANN & NORMANN
Attorneys for defendants
524-7604
(Signed) MARGOT MAZEAU
MARGOT MAZEAU,
Trial Attorney

[fol. 6]

JOINT STIPULATION

(Number and Title Omitted)

IT IS STIPULATED by and between counsel representing plaintiff and defendants, respectively, that Billy Glona was an illegitimate child, that his father was someone other than Otto W. Glona, and further, that his mother, the plaintiff herein, was not married at the time of the conception, or date of birth of said Billy Glona.

New Orleans, Louisiana, this 22 day of December, 1965.

LEONARD J. FAGOT,
WILLIAM F. WESSEL, and
MARVIN C. GRODSKY,
Attorneys for Complainant
(Signed) MARVIN C. GRODSKY
MARVIN C. GRODSKY,
Trial Attorney
1605 N.B.C. Bldg.
New Orleans, Louisiana

NORMANN & NORMANN
1605 Hibernia Bank Building
New Orleans, Louisiana
Attorneys for Defendants
(Signed) MARGOT MAZEAU
MARGOT MAZEAU

[fol. 13]
MINUTE ENTRY:
June 22, 1966
HEEBE, J.

(Number and Title Omitted)

This cause came on this day for hearing on motion of defendants for summary judgment.

PRESENT: William Wessel, Esq.
Attorney for Plaintiff

Mrs. Margot Mazeau,
Attorney for Defendants

Counsel for defendants presented a supplemental memo to the Court.

IT IS ORDERED BY THE COURT that motion of defendants for summary judgment be, and the same is hereby, GRANTED.

[fol. 14]

JUDGMENT

Filed: Jun. 24, 1966

United States District Court
Eastern District of Louisiana
New Orleans Division
Division "B"

No. 15,974
Civil Action

Mrs. Minnie Brade Glona

versus

American Guarantee & Liability
Insurance Company and
Henry O. Mac Donell

The Court having, on June 22, 1966, granted the motion of defendants for summary judgment;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, American Guarantee & Liability Insurance Company and Henry O. Mac Donell, and against the plaintiff, Mrs. Minnie Brade Glona, dismissing said plaintiff's suit with costs.

Dated at New Orleans, Louisiana on this 24 day of June, 1966.

(Signed) A. DALLAM O'BRIEN, JR.
A. DALLAM O'BRIEN, JR.
CLERK

[fol. 15]

NOTICE OF APPEAL

Filed: Jul. 22, 1966

United States District Court
Eastern District of Louisiana
New Orleans Division

Mrs. Minnie Brade Glona

No. 15974
versus Civil Action
Division "B"

American Guarantee & Liability
Insurance Company, and Henry O. Mac Donell

Notice is hereby given that MRS. MINNIE BRADE GLONA, plaintiff above named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment on Motion for Summary Judgment in favor of defendants AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, and

HENRY O. MAC DONELL, entered in this action on June 24, 1966.

LEONARD J. FAGOT,
WILLIAM F. WESSEL, and
MARVIN C. GRODSKY
(Signed) WILLIAM F. WESSEL
WILLIAM F. WESSEL
Attorneys for Plaintiff
1605 National Bank of
Commerce Building
New Orleans, Louisiana
523-6421

CERTIFICATE

I certify that a copy of the above and foregoing Notice of Appeal has been forwarded to (Mrs.) Margot Mazeau, Normann & Normann, Attorneys for defendants, this 22 day of July, 1966.

(Signed) WILLIAM F. WESSEL
WILLIAM F. WESSEL

[fol. 17]

EXCERPT OF TRANSCRIPT

In The United States District Court
For the Eastern District of Louisiana
New Orleans Division

Mrs. Minnie Brade Glona
vs. Civil Action 15974
American Guarantee & Liability Insurance
Company, Et Al

APPEARANCES:

WILLIAM F. WESSEL, Esq.
National Bank of Commerce
Building
New Orleans, Louisiana
Attorney for Plaintiff

MARGOT MAZEAU
NORMANN & NORMANN
Hibernia Building
New Orleans, Louisiana
Attorneys for Defendants

— — — —

(The above entitled and numbered matter came up for hearing on this, the 22nd day of June, 1966, in the Courtroom, 400 Royal Street, New Orleans, Louisiana; THE HONORABLE FREDERICK J. R. HEEBE, presiding.)

[fol. 18]

PROCEEDINGS

THE COURT:

Civil Action Number 15974, Mrs. Minnie Brade Glona versus American Guarantee & Liability Insurance Company, et al.

(Argument by Mrs. Mazeau and Mr. Wessel.)

MRS. MAZEAU:

For the purpose of this Motion for Summary Judgment only, we admit that the child was informally acknowledged; however, the child was at no time legitimated. So, for the purposes of this argument, and according to the stipulation which we have filed, this deceased was an illegitimate child. . . . . .

REPORTER'S CERTIFICATE

The undersigned certifies in his official capacity of Court Reporter for the United States District Court, Eastern District of Louisiana, the foregoing to be a true and correct transcription of his Stenograph notes taken during the proceedings in the above-numbered and titled case, on the 22nd day of June, 1966.

(Signed) VIDAL G. APODACA
Vidal G. Apodaca
Official Court Reporter
United States District Court

[fol.]

In The
United States Court of Appeals
For the Fifth Circuit

No. 24,181

Mrs. Minnie Brade Glona,

Appellant,

versus

American Guarantee & Liability Insurance Company, Et Al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 22, 1967.)

Before RIVES and DYER, Circuit Judges, and JOHNSON, District Judge.

PER CURIAM: This suit was instituted in the United States District Court for the Eastern District of Louisiana by the plaintiff, Mrs. Minnie Brade Glona, a resident of Texas, who sues the defendants, American Guarantee & Liability Insurance Company and its insured, a resident of Louisiana, to recover for the wrongful death of her son, who died as a result of an

automobile accident which occurred in the city of New Orleans in September, 1964. Defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the ground that the plaintiff's deceased son, although informally recognized by the plaintiff, was her illegitimate son and that, therefore, plaintiff had no cause of action for his death.[1]

Plaintiff, in opposition to the motion for summary judgment, acknowledged that under the Louisiana law she had no right of action for the death of her illegitimate child but urged that to so restrict Article 2315 of the Louisiana Civil Code violates the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. Upon such submission, the District Court granted the defendants' motion for summary judgment.

Plaintiff argues for the first time on this appeal that the granting of the Rule 56 motion was erroneous for the reason that the laws of Texas should be applied in determining whether or not she has a right of action

---

[1]The Civil Code of Louisiana, Article 2315, provides for the right of recovery for wrongful death in favor of "the surviving father and mother of the deceased, or either of them." The statute does not state "legitimate father" or "legitimate mother." The Louisiana courts have held that the words "mother," "children," and "father" have reference to survivors of legitimates. The decedent must be legitimate in order for an ascendant to recover. See *Vaughn v. Dalton-Land Lumber Co.*, 119 La. 61, 43 So. 926; *Jackson v. Lindholm*, 84 So. 2d 101 (C.A. Orl. 1955), and *Buie v. Hester*, 147 So. 2d 733 (2 C.A. 1962).

against defendants.[2] Plaintiff's theory that the law of Texas should be applied even though the injury and death occurred in Louisiana is that, by reason of plaintiff's domicile, Texas has a more significant relationship with the occurrence than Louisiana. Such an argument at this point is foreclosed. Upon being met with defendants' motion for summary judgment, plaintiff was authorized by Rule 56 to develop factually that the law of the domicile had a more significant relationship with the occurrence than the *lex loci delicti*. Plaintiff failed to do this, and such an issue was not raised upon the submission to the District Judge.

As to plaintiff's argument that the construction by the Louisiana courts of Article 2315, Civil Code of Louisiana, so restricts said provision that it violates the equal protection clause of the Fourteenth Amendment, this Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable. *Morey v. Doud*, 354 U.S. 457.

The motion for summary judgment was properly granted, and the action of the District Court is

AFFIRMED.

---

[2]The Texas wrongful death statute, Title 17 Vernon's Texas Civil Stat. Art. 4675, as the same has been construed by the Texas courts, would authorize an action such as plaintiff's for the wrongful death of her illegitimate son.

[fol.]

JUDGMENT

United States Court of Appeals
For the Fifth Circuit

October Term, 1966

No 24,181

D.C. Docket No. 15974-Civil Action Div. "B"

Mrs. Minnie Brade Glona,
Appellant,

versus

American Guarantee & Liability Insurance Company, Et Al.,
Appellees.

Appeal form the United States District Court for the Eastern District of Louisiana.

Before RIVES and DYER, Circuit Judges, and JOHNSON, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Mrs. Minnie Brade Glona, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 22, 1967

Issued as Mandate: Jul. 17, 1967

[fol.]

SUPREME COURT OF THE UNITED STATES

No. 639, October Term, 1967

Minnie Brade Glona,

Petitioner,

v.

American Guarantee & Liability Insurance Company, et al.

Filed: Dec. 8, 1967

ORDER ALLOWING CERTIORARI. Filed December 4, 1967.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 508.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

A true copy JOHN F. DAVIS
Test:
Clerk of the Supreme Court of the United States
By /s/ E. P. CULLINAN
Chief Deputy

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In The

Supreme Court of the United States

October Term, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET. AL.,

Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

BENJAMIN E. SMITH
1006 Baronne Building
New Orleans, Louisiana 70112

WILLIAM F. WESSEL
MARVIN C. GRODSKY
LEONARD J. FAGOT
1605 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No.

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY ET AL

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Mrs. Minnie Brade Glona, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 22, 1967, which affirmed the judgment of the United States District Court for the Eastern District of Louisiana dismissing petitioner's claim for damages for wrongful death of her minor illegitimate son.

OPINIONS BELOW

FIFTH CIRCUIT. The opinion of the Court below in this case (Appendix A, infra. pp. 12-14) has not yet been reported.

DISTRICT COURT. The District Court wrote no opinion. Its judgment dated June 24, 1966 is found in the Appendix A, infra p. 15; it was not reported.

JURISDICTION

The judgment and opinion of the Court below (Appendix A, infra at p. 12) was entered on June 22, 1967. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code Sec. 1254 (1).

THE QUESTION PRESENTED

Whether the application and construction of Louisiana Civil Code, Article 2315, which grants parents the right to recover damages for wrongful death of legitimate children but denies recovery for wrongful death of illegitimate children is invalid under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Civil Code, Article 2315 provides as follows:

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right

which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

STATEMENT OF THE CASE

Mrs. Minnie Brade Glona brought this action for damages for the wrongful death of her illegitimate, minor child, against the insurer of the alleged tortfeasor and the alleged tortfeasor.

Petitioner was a Texas domicillary at the time of the death of her son and at the time suit was brought.

The jurisdiction of the United States District Court was based on diversity of citizenship, Article III, Section 2, U. S. Constitution, and Title 28, U. S. Code Section 1332.

The claim arose out of an automobile collision in New Orleans, Louisiana and the son of petitioner died in Harahan, Louisiana.

The decedent was never adopted or legitimated by petitioner; he was, however, informally acknowledged

by his mother, petitioner. Decedent never married and had no children whatsoever.

The district court granted summary judgment for the defendants, on the predicate that mothers may not recover for wrongful death of their illegitimate children in Louisiana under the jurisprudence of that State.

The Court of Appeals, in a per curiam decision, affirmed the judgment of the district court on June 22, 1967.

REASONS FOR GRANTING THE WRIT

The Civil Code of Louisiana, Article 2315, provides for the right of recovery for wrongful death in favor of "the surviving father and mother of the deceased, or either of them." The statute does not state "legitimate father" or "legitimate mother." The Louisiana Courts have held that the words "mother," "children" or "father" has reference to survivors of legitimates. The decedent must be legitimate in order for an ascendant to recover. See: *Vaughn v. Dalton-Lard Lumber Co.*, 119 La. 61, 43 So 926; *Jackson v. Lindholm* 84 So. 2d 101 (C.A. Orl. 1955) and *Buie v. Hester*, 147 So. 2d 733 (2 C.A. 1962).

Petitioner, being a domicillary of Texas, could have recovered for the wrongful death of her illegitimate son if she could have sued in Texas. Title 17 Vernons Texas Civil Statutes, Article 4675; *Galveston H. & S. A. Ry. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705, 706 (1907). There would have been no reason why peti-

tioner should have legitimated or adopted her natural son from the viewpoint of Texas law.

Even Louisiana's most recent pronouncement as to the reason for denying recovery where illegitimates are involved would not apply to petitioner. *Levy v. State,* 192 So. 2d 193 (4 Cir. 1966); *cert. den.* 250 La. 25, 193 So. 2d. 530. (1967); *App. pen.,* U. S. Supreme Court, No. 508.

In *Levy* the Louisiana Court stated that the purpose of classifying illegitimates out of the provisions of Article 2315, Louisiana Civil Code, "is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock." *Ibid.* 192 So. 2d 193, 195.

In Louisiana a classification has been made by the Courts (not the Legislature) in the interpretation of Louisiana Civil Code, Article 2315, which is constitutionally irrelevant,[1] and, therefore, unrecognizable, even under the *Erie* Doctrine.[2]

Nowhere in the Article, itself, is there a restricting provision declaring that only legitimate parents or legitimate children are to be included. The Article speaks

---

[1]The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed or color. *Edwards vs. California,* 314 U.S. 160, 184 (1941). It is suggested "that there are some differences between men which cannot constitutionally be recognized, that classifications based upon such irrelevancies are repugnant to the Constitution." Tussman and ten-Broek, *The Equal Protection of the Laws,* 37 Cal.L.Rev.341, 353 (1949).

[2]*Erie v. Tompkins,* 303 U. S. 64, 58 S. Ct. 817 (1938).

of "surviving father and mother" and not "legitimate child."

Article 27 and 178 of the Code treat of children as being "legitimate, illegitimate or legitimated." But 2315 as amended does not speak of a particular class of children nor does it speak of a particular class of parents. "The words of a law are generally to be understood in their most usual signification." *La. Civ. Code*, Art. 14.

It is not even suggested that the legislature sought to delimit Article 2315. It is only the Courts that have done so.

Denying to an illegitimate's family the right to sue for his death and injury and to allow legitimate families to do so is an arbitrary and impermissible classification set up not by the legislature but by the Courts, resulting in an unequal application of the law by the Courts.

> "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or *applied*, single out that class for different treatment not based on reasonable classification, the guarantees of the Constitution have been violated." *Hernandez v. Texas*, 74 S. Ct. 667, 670, 347 U. S. 475 (1954), (Emphasis supplied)

The State has the right to classify, but here the State through its legislative body did not choose to classify. It is in the Courts of Louisiana that classification takes place. The legislature has never declared

a public policy that the estates of illegitimate children are not inheritable. If illegitimates have no posterity, their natural parents or either of them inherit. *La. Civ. Code*, Article 992. No difference can be made out for the survival of a wrongful death claim as between legitimates and illegitimates. If illegitimates inherit property from natural parents and vice-versa, and the claim for wrongful death is a property right (see *Buie v. Hester*, 147 So. 2d 733 [2nd Cir. 1962]) then the instant plaintiff should be able to assert her rights. Even under a constrained position, if there is to be classification, it must "always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily, and without any such basis . . . Arbitrary selection can never be justified by calling it classification." *Gulf v. Ellis*, 165 U. S. 150, 155, 17 S. Ct. at 258 cited with approval and quoted in *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 287 (1965).

As far as purpose is concerned, an illegitimate child can be just as dependent on his mother, and vice versa, as a legitimate one. The fact that the illegitimacy rate has been on the incline certainly demonstrates this.[3] The Federal Welfare and other Federal laws have recognized this.[4]

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[3]259,400 illegitimate births in the U.S. in 1963. U.S. Census Bureau, Stat. Abstract of the U.S. 47, 51 (1965).

[4]Note, *The Rights of Illegitimates under Federal Statutes*, 76 Harv. L. Rev. 337 (1962). State laws are changing also: Like Texas, previously cited in Point I, Arizona and Oregon give full recognition and rights to illegitimates as if they were legitimate except they may not dwell with the family of their father if the father is married. Ariz. R. S. Ann. Sec. 14-206 (1956); Ore. Rev. Stat. Sec. 109.060 (1957)

The Social Security Act, 42 U.S.C. 416 (h) (2), 416 (h) (3); Veterans Legislation, 38 U.S.C. 101 (4); Foreign Service Act, 22 U.S.C. 1064 (3) all include illegitimates within their extending provisions. The Jones Act (46 U.S.C. 688) apparently does. *Civil v. Waterman,* 217 F. 2d 94 (2 C.A. 1954). The Federal Employer's Liability Act (45 U.S.C. 51) does. *Huber v. Baltimore,* 241 F.S. 646 (D. Md. 1965), and the Death on the High Seas Act (46 U.S.C. 761) does. *Middleton v. Luckenbach S. S. Co.,* 70 F. 2d 326, 330 (2 C.A. 1934).

Furthermore, Louisiana treats illegitimates equally for the purpose of its criminal law. There is no distinction between legitimate and illegitimate where incest is concerned. L.S.A.-R.S. 14:78. Kill the mother of an illegitimate, or the illegitimate, and one suffers the criminal consequence. L.S.A.-R.S. 14:29. A Louisiana illegitimate and his mother inherit from each other as was brought out above. But Louisiana draws the line at that point, and absolves the killers of illegitimates and their mothers from all civil liability. The distinction and classification is as odious as former policies of barring illegitimates from public office, preventing them from testifying, providing farcical penalties for their murderers, and denying them burial.[5]

It is submitted that the real reason of Louisiana is simply pure prejudice. Our legislature never expressed a purpose to de-classify from Article 2315 mothers of il-

---

[5]See Krause, *Equal Protection for the Illegitimate,* 65 Mich. L. Rev. 477, 489 et seq. (1967).

legitimates. Most legislation in Louisiana has been to take the burden off the illegitimate family.

Nor does the fact that Louisiana Courts treat all illegitimates and parents of illegitimates equally end the judicial inquiry. *Carrington v. Rash*, 380 U. S. 89, 85 S. Ct. 775 (1965).

The classification invoked by Louisiana does not comply with the over/under inclusive test of *Skinner v. Oklahoma*, 316 U. S. 535 (1942). A mother is no less a mother if her son is illegitimate.

It must be pointed out that the Supreme Court in *Jones v. Jones*, 234 U. S. 615, 34 S. Ct. 937 (1914) took a different view in an analogous matter involving inheritance rights of "free born" as opposed to "slave born." In so far as that case may have hinged on the "equal protection" clause, petitioner urges that the case history since 1914 on that clause is in direct conflict with the *Jones* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court below is erroneous. The factor of illegitimacy is an irrelevant accident in the face of our common humanity. The present petition for a writ of Certiorari should therefore be granted.

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CERTIFICATE

I certify that a copy of the foregoing application has been served upon the opposing counsel by placing same in the United States Mail, properly addressed, with adequate postage affixed thereto.

_____

BENJAMIN E. SMITH

APPENDIX A

OPINION OF THE COURT OF APPEAL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,181

MRS. MINNIE BRADE GLONA,
Appellant,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 22, 1967.)

Before RIVES and DYER, Circuit Judges, and JOHNSON, District Judge.

PER CURIAM: This suit was instituted in the United States District Court for the Eastern District of Louisiana by the plaintiff, Mrs. Minnie Brade Glona, a resident of Texas, who sues the defendants, American

Guarantee & Liability Insurance Company and its insured, a resident of Louisiana, to recover for the wrongful death of her son, who died as a result of an automobile accident which occurred in the city of New Orleans in September, 1964. Defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the ground that the plaintiff's deceased son, although informally recognized by the plaintiff, was her illegitimate son and that, therefore, plaintiff had no cause of action for his death.[1]

Plaintiff, in opposition to the motion for summary judgment, acknowledged that under the Louisiana law she had not right of action for the death of her illegitimate child but urged that to so restrict Article 2315 of the Louisiana Civil Code violates the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. Upon such submission, the District Court granted the defendants' motion for summary judgment.

Plaintiff argues for the first time on this appeal that the granting of the Rule 56 motion was erroneous for the reason that the laws of Texas should be applied in determining whether or not she has a right of action

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[1]The Civil Code of Louisiana, Article 2315 provides for the right of recovery for wrongful death in favor of "the surviving father and mother of the deceased or either of them." The statute does not state "legitimate father" or "legitimate mother." The Louisiana courts have held that the words "mother," "children," and "father" have reference to survivors of legitimates. The decedent must be legitimate in order for an ascendant to recover. See *Vaughn v. Dalton-Land Lumber Co.*, 119 La. 61, 43 So. 926; *Jackson v. Lindholm*, 84 So. 2d 101 (C.A. Orl. 1955), and *Buie v. Hester*, 147 So. 2d 733 (2 C.A. 1962).

against defendants.[2] Plaintiff's theory that the law of Texas should be applied even though the injury and death occurred in Louisiana is that, by reason of plaintiff's domicile, Texas has a more significant relationship with the occurrence than Louisiana. Such an argument at this point is foreclosed. Upon being met with defendants' motion for summary judgment, plaintiff was authorized by Rule 56 to develop factually that the law of the domicile had a more significant relationship with the occurrence than the *lex loci delicti.* Plaintiff failed to do this, and such an issue was not raised upon the submission to the District Judge.

As to plaintiff's argument that the construction by the Louisiana courts of Article 2315, Civil Code of Louisiana, so restricts said provision that it violates the equal protection clause of the Fourteenth Amendment, this Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from Classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable. *Morey v. Doud,* 354 U.S. 347.

The motion for summary judgment was properly granted, and the action of the District Court is

AFFIRMED.

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[2]The Texas wrongful death statute, Title 17 Vernon's Texas Civil Stat. Art. 4675, as the same has been construed by the Texas courts, would authorize an action such as plaintiff's for the wrongful death of her illegitimate son.

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
DIVISION "B"

No. 15,974

CIVIL ACTION

MRS. MINNIE BRADE GLONA

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY and HENRY O. MacDONELL

JUDGMENT

The Court having, on June 22, 1966, granted the motion of defendants for summary judgment;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, American Guarantee & Liability Insurance Company and Henry O. MacDonell and against the plaintiff, Mrs. Minnie Brade Glona, dismissing said plaintiff's suit with costs.

Dated at New Orleans, Louisiana on this 24th day of June, 1966.

(Signed) A. DALLAM O'BRIEN, JR.,
A. DALLAM O'BRIEN, JR.
Clerk

SUPREME COURT, U. S.

FILED

OCT 12 1967

JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1967

No. 639

MRS. MINNIE BRADE GLONA,

Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET. AL.,

Respondents.

Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The following brief is submitted by respondents, American Guarantee and Liability Insurance Company and Henry O. MacDonnell, in opposition to the application for writ of certiorari filed by petitioner, Mrs. Minnie Brade Glona.

ARGUMENT

As admitted by petitioner, the Louisiana courts, in interpreting the Louisiana Wrongful Death Statute, Article 2315 of the Louisiana Civil Code, have consistently held that no cause of action exists for the death of illegitimates. Thus, the only question before the Court is whether or not a classification into legitimates and illegitimates rests upon a reasonable basis or is purely arbitrary and capricious, as contended by petitioner.

At the outset, we deem it advisable to dispose of petitioner's argument that this classification has been made only by the courts rather than by the legislature. Since the first enactment of the Wrongful Death Statute in 1870 the Legislature has amended Article 2315 on six different occasions, the last amendment having been made in 1960. However, although the courts have held for over sixty years[1] that Article 2315 does not provide recovery for the death of an illegitimate child, no amendment has been made with reference thereto, thus indicating that the courts have fully complied with the legislative intent of the statute.

Petitioner's contention that the "real reason of Louisiana [for denying recovery for the death of illegitimates] is simply pure prejudice," is not supported either in law or in fact, and is particularly inappropriate when applied to this petitioner. Under

---

[1]The first case so holding was Lynch v. Knoop, 118 La. 611, 43 So. 252, decided in 1907.

Louisiana law, the mother of an illegitimate child, has it in her power to confer legitimate status upon her child through legitimation under Article 200 of the Louisiana Civil Code, or by adoption. Therefore, petitioner's inability to bring this suit resulted from her own actions and not that of the Louisiana courts or legislature.

It is well established that a state has the right, under the Constitution, to enact legislation to protect the health, morals and general welfare of its citizens, which includes the right to legislate in the area of sexual conduct. See, *McLaughlin v. State of Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964).

It is further established that the equal protection clause of the Fourteenth Amendment permits the state to classify, the only requirement being that the classification is based upon some reasonable basis. As was stated in *Morey v. Doud*, 354 U.S. 457, 463-464 77 S.Ct. 1344, 1349 (1957):

> "The rules for testing a discrimination have been summarized as follows:
>
> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some rea-

sonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonis Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369."

Under the foregoing authorities, the issue before the Court is whether or not the classification into legitimates and illegitimates for purposes of the Louisiana Wrongful Death Statute has *any* reasonable basis at all or is based upon "pure prejudice" as argued by plaintiff. Plaintiff bears the burden of proving that the law does not rest upon any reasonable basis at all, and such burden is certainly not satisfied by quoting statistics showing an increase in the illegitimacy rate and by merely labelling the law as prejudicial.

That Louisiana has not engaged in any prejudicial practices against illegitimates is amply supported by the fact that it has enacted various laws designed to encourage the elevation of an illegitimate to the status of a legitimate child, such as legitima-

tion and adoption. In 1948 the legislature amended Article 198 of the Louisiana Civil Code to permit the legitimation of adulterous bastards, thus evidencing a policy geared towards bringing the illegitimate into a legitimate family relationship.

By the same token, Louisiana, as any other state has a legitimate interest in protecting the general welfare and morals of its citizens, in preserving the family unit, protecting the marital relationship and in discouraging "bringing children into the world out of wedlock." *Levy v. State,* 192 So. 2d 193 (4th Cir., 1966). In enacting such laws, the State is allowed wide discretion. As was stated in the recent case of *McLaughlin v. State of Florida,* 379 U.S. 184, 191, 85 S.Ct. 283, 288 (1964):

> "Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious."

In the case of *McGowan v. State of Maryland,* 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105 (1961) the Court, in passing upon the constitutionality of the Maryland Sunday closing law, held that

> "Although no precise formula has been developed, the Court has held that the Four-

> teenth Amendment permits the States a wide discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.
>
> A statutory discrimination will not be set aside if any state of facts may be conceived to justify it." (Emphasis supplied)

In the *McGowan* case, *supra,* the Supreme Court held that

> "a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day."

In the instant case, we submit that the classification into legitimates and illegitimates is reasonable in furtherance of the State's interest in promoting legitimate relationship and discouraging illegitimacy, and such classification certainly is not "wholly irrelevant" to the legislative purpose.

A system which would extinguish any classification between legitimates and illegitimates would under-

mine and endanger, if not destroy, the legal institution of marriage and the family unit, which gives moral support and stability to society in general. The principle that legislation for the protection of the family is not only reasonable, but is necessary and desirable, was forcefully stated by the U.S. Supreme Court in the case of Murphy v. Ramsey, 114 U.S. 15, 45; 5 S.Ct. 747, 764 (1885) as follows:

> "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, * * * than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization."

It is submitted that the classification of legitimates and illegitimates, far from being arbitrary and capricious, is based upon sound public policy, namely the preservation of the integrity of and the rights flowing from legal relationships and the discouraging of promiscuity, bigamy, adultery, illegitimacy and other undesirable consequences of uncontrolled sexual conduct. If a state has the right to enact laws controlling and criminally punishing undesirable sexual conduct and laws prescribing the prerequisites of legal marriages, there should be no doubt that the state has the constitutional power to regulate what rights, if any, should flow from illegitimate relationships.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

Frank S. Normann

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IN THE

Supreme Court of The United States

October Term, 1967

No. 639

MRS. MINNIE BRADE GLONA,

Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET. AL.,

On Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONER

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Louisiana Civil Code, Article 2315 ..... 3, *passim*

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Federal Employee's Group Life Insurance Act (5 U.S.C. 2093) 21

Lord Campbell's Act (Fatal Accidents Act) 9 and 10 Vict. 1 c. 93 (1846) 9, 10

TABLE OF AUTHORITIES (Continued)

Cases: Page

Andrzejewski v. Northwestern Fuel Co., 158 Wisc. 170, 148 N.W. 37 (1914) 19

Babcock v. Jackson, 63 Cal. L.R. 1219 (1963) 14

Brown v. Board of Ed., 347 U.S. 483, 494, 74 S. Ct. 686, 691 (1954) 18

Buie v. Hester, 147 So. 2d 733 (La. App. 2-1962) 10

Carrington v. Rash, 380 U.S. 89, 85 S. Ct. 775 (1965) 12

Chivers v. Couch Motor Lines, Inc., 159 So. 2d 544 (La. App. 3, 1964) 14

Civil v. Waterman, 217 F.2d 94 (1954) 20

Edwards v. Calif., 314 U.S. 160, 184, 62 S. Ct. 164, 172 (1941) 11

Galveston H & S.A. Ry. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S.W. 705, 706 (1907) 14

Galveston v. Walker, 48 Tex. Civ. App. 52, 106 S.W. 705, (1907) 19

Gulf v. Ellis, 165 U.S. 150, 17 S.Ct. 255 (1897) 16

Hammond v. Pa. R.R. Co., 31 N.J. 244, 156 A.2d 689 (1959) 21

Harris v. Illinois Cent. R. Co., 220 F.2d 134 (CA 5 Cir., 1955) 16

TABLE OF AUTHORITIES (Continued)

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Hassan v. A. M. Landry & Son, Inc., 321 F.2d 570 (5 Cir. 1963), Cert. Den., 375 U.S. 967, 84 S.Ct. 486 (1963) 20

Hernandez v. Texas, 347 U.S. 475, 478, 74 S. Ct. 667, 670 (1954) 11

Hirabayashi v. U.S., 320 U.S. 81, 63 S. Ct. 1385 (1943) 12

Hoeper v. Tax Comm., 284 U.S. 206, 219, 52 S.Ct. 120, 123 (1931) 15

Huber v. Baltimore, 241 F.S. 646 (D.Md. 1965) 21

Hubgh v. N. O. & C. RR., 6 La. Ann. 495, 54 Am. Dec. 155 (1851) 9

Huddleston v. Henderson, 181 Ill. App. 176 (1913) 19

In Re Panama Transp. Co., 98 F. S. 114 (D.C.N.Y. 1951), aff'd. 195 F. 2d 104 20

Kotch v. Board of Comm'r, 330 U.S. 552, 565, 67 S. Ct. 910, 916 (1947) 12

Levy v. State, 192 So. 2d 193 (La. App. 4, 1966) cert. den. 250 La. 25, 193 So.2d 530 (1967), App. Pen. U.S.S.Ct. No. 508, ——— U.S. ———, 88 S.Ct. 290 (1967) 6

Loving v. Va., 388 U.S. 1, 6, 87 S.Ct. 1817, 1823 (1967) 11

Lynch v. Knoop, 118 La. 611, 43 So. 252 (1907) 6

TABLE OF AUTHORITIES (Continued)

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Marshall v. Wabash Ry., 120 Mo. 275, 25 S.W. 179 (1894) 19

McLaughlin v. Florida, 379 U.S. 184, 196, 85 S. Ct. 283, 290 (1964) 12

Metro Life Ins. Co. v. Thompson, 368 F.2d 791 (3 Cir. 1966) 21

Middleton v. Luckenbach S.S. Co., 70 F.2d 326, 330 (2 Cir. 1934) cert. den. 293 U.S. 579, 55 S. Ct. 89 (1934) 20

Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344 (1957) 16

Porsberg v. Klien, 39 Ohio L.A. 470, 53 N.E. 2nd 63 (1944) 19

Port of N.O. v. City, 223 La. 199, 65 So. 2d 313 (1953) 20

Rwy. Exp. v. N.Y., 336 U.S. 106, 115, 69 S.Ct. 463, 468 (1949) 16

Richards v. U.S., 1, 82 S.Ct. 585 (1961) 14

Sesostris Youchian v. Texas & P. Ry. Co., 147 La. 1080, 86 So. 551 (1920) 6

Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942) 16

Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582 (1931) 13

Sou. Ry. Co. v. Carlton, 118 So. 458 (Ala. 1928) 19

TABLE OF AUTHORITIES (Continued)

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Stoneburner v. Theodoratus, 30 P.2d 1001 (Cal. App. 1934), 31 P.2d 1042 (1934) 19

Sturm v. Hutchinson, 37 S.2d 45 (La. App. 1-1948) 17

Thomas v. Matthew Lumber Co., 201 So. 2d 357 (La. App. 2-1967) 20

Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 22 So.2d 842 (1945) 19

Tune v. L & N RR. Co., 223 F.S. 928 (D. Tenn. 1963) 21

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886) 12

Other:

Right of Children to an Action for Wrongful Death Under Article 2315, 14 Tul. L. Rev. 612 (1940) 6

Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 709 (1962) 7

Ireland, *The Use of Decisions by United States Students of Civil Law*, 8 Tul. L. Rev. 358, 360 (1934) 7

Daggett, Dainow, Hebert, McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of La.*, 12 Tul. L. Rev. 12 (1937) 7

Tucker, *The Code and the Comman Law in Louisiana*, 29 Tul. L. Rev. 739, 759 (1955) 8

TABLE OF AUTHORITIES (Continued)

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Stone, *Tort Doctrine in Louisiana: The Concept of Fault,* 27 Tul. L. Rev. 1 (1952) 8, 9

Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law and in Louisiana,* 6 Tul. L. Rev. 201 (1931) 8, 9

Oppenheim, *The Survival of Tort Actions,* 16 Tul. L. Rev. 386, 412 (1942) 8, 10

3 Blackstone's Commentaries (Lewis ed. 1922) 119 .. 9

Speiser, *Recovery for Wrongful Death,* iii, 12 (1966) 10

Foster & Freed, *Unequal Protection: Poverty and Family Law,* 42 Ind. L.J. 193, 220 (1967) 14

Krauss, *Equal Protection for the Illegitimates,* 65 Mich. L.R. 477, 491 (1967) 14

Krauss, *The Non-Marital Child — New Conceptions for the Law of Unlawfulness,* 1 Fam. Law Qtrly 1 (ABA-Je, 1967) 14

Currie, *The Disinterested Third State,* 28 Law & Cont. Prob. 754 (1963) 14

Currie, *Survival of Action: Adjudication versus Automation in the Conflict of Laws,* 10 Stan. L.R. 205 (1958) 14

Holmes, *The Common Law,* 73 15

Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Cal. L.R. 341, 353 (1949) 16

Illegitimacy, 26 Brooklyn L.R. 45, 82 (1959) 18

TABLE OF AUTHORITIES (Continued)

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tenBroek, *California's Dual System of Family Law*, 16 Stanf. L.R. 257 & 900 (1964); 17 Stanf. L.R. 614 (1965) 18

McKeon, R., *Justice and Equality*, NOMOS VI (Prentice Hall - 1963) 58 18

Workmen's Compensation, Illegitimate children, 20 Tul. L.R. 145 (1945) 19

The Rights of Illegitimates Under Federal Statutes, 76 Harv. L. Rev. 337 (1962) 20

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY, ET. AL.,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

Fifth Circuit

The opinion of the court below in this case is reported at 379 F.2d 545, and is set out at *App.* 15.

The District Court

The District Court wrote no opinion. Its judgment dated June 24, 1966 is found at *App.* 10; it was not reported.

JURISDICTION

The Fifth Circuit Court of Appeals rendered its opinion and judgment on June 22, 1967, which was issued as mandate on July 17. Petition for certiorari was filed September 20, 1967 and certiorari was granted December 4, 1967. *App.* 20. Jurisdiction of this Court is conferred under the provisions of 28 U.S.C. 1254(1).

THE QUESTION PRESENTED

Whether the application and construction of Louisiana Civil Code, Article 2315, which grants parents the right to recover damages for wrongful death of legitimate children but denies recovery for wrongful death of illegitimate children is invalid under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Civil Code, Article 2315 Provides As Follows:

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited

by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' "brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

STATEMENT OF THE CASE

Mrs. Minnie Brade Glona brought this action for damages for the wrongful death of her illegitimate, minor child, against the insurer of the alleged tortfeasor and the alleged tortfeasor.

Petitioner was a Texas domicillary at the time of the death of her son and at the time suit was brought.

The jurisdiction of the United States District Court was based on diversity of citizenship, Article III, Section 2, U. S. Constitution, and Title 28, U. S. Code Section 1332.

The claim arose out of an automobile collision in New Orleans, Louisiana and the son of petitioner died in Harahan, Louisiana.

The decedent was never adopted or legitimated by petitioner; he was, however, informally acknowledged by his mother, petitioner. Decedent never married and had no children whatsoever.

The district court granted summary judgment for the defendants, on the predicate that mothers may not recover for wrongful death of their illegitimate children in Louisiana under the jurisprudence of that State.

The Court of Appeals, in a per curiam decision, affirmed the judgment of the district court on June 22, 1967.

ARGUMENT

I.

THE DENIAL OF THE RIGHT TO RECOVER FOR DAMAGES FOR WRONGFUL DEATH TO MOTHERS OF ILLEGITIMATES IS A DENIAL OF EQUAL PROTECTION OF THE LAWS

"[I]nequalities arbitrarily created arouse the sense of injustice, because equal treatment of those similarly situated with respect to the issue before the court is a deep implicit expectation of the legal order." Edmond Cahn, THE SENSE OF INJUSTICE, 14.

A. INTRODUCTION — LOUISIANA APPROACH

Petitioner claims that she falls into the second classification of the survivorship portion of Louisiana's wrongful death statute, namely, "the surviving mother of the deceased". Billy Glona died, a minor, having

never married and leaving no children. *App.* 5. There is no gainsaying the fact that Mrs. Glona is the "mother" of Billy Glona, but because Louisiana courts have applied Article 2315 of the Civil Code in such a way as to deny to mothers of illegitimates the protection and benefits of the wrongful death statute, *Lynch v. Knoop*, 118 La. 611, 43 So. 252 (1907), the District Court and Fifth Circuit denied petitioner the right to recover for her son's death.

Article 2315 provides for the right of recovery for wrongful death in favor of "the surviving *father* and *mother* of the deceased, or either of them." The statute does not state 'legitimate' father or 'legitimate' mother. It has only been in the application of the statute by the Louisiana courts that the right to recovery has been so restricted.[1] Petitioner contends that the Louisiana courts have by their strained construction applied Article 2315 so as to deny her the equal protection of law guaranteed to her under the Fourteenth Amendment.

Within the framework of the legal system of Louisiana, the authorities are to be found, in order of rank,

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[1]The construction by Louisiana courts has been applied to children also. *Sesostris Youchican v. Texas & P. Ry. Co.*, 147 La. 1080, 86 So. 551(1920) denied an illegitimate Indian child the right to recover for his mother's death even though his parents were married according to tribal (but not Louisiana) ritual. See also *Levy v. State*, 192 So. 2d 193 (La. App. 4, 1966) cert. den. 250 La. 25, 193 So.2d 530(1967), *App.Pen.*, U.S.S.Ct. No. 508, ——— U. S. ———, 88 S.Ct. 290(1967). See generally: Note, *Rights of Children to an Action for Wrongful Death under Article 2315*, 14 Tul. L. Rev. 612(1940).

firstly in the statute itself, secondly in the doctrinal writings, only then in prior jurisprudence.[2]

> "The civilian does not regard the judicial interpretations of a statute as becoming part of the statute, so that the statute *as interpreted* is the law. He regards the statute alone as being the law, and prior decisions do not 'insulate' him in Professor Morrow's happy phrasing, (footnote omitted) from going directly to the statute for its meaning. In ideal theory, the civilian judge decides cases primarily 'not by reference to other decisions, but by reference to legislative texts and within limits of such judicial discretion as the legislative texts grant.' " Tate, *Techniques of Judicial Interpretation in Louisiana,* 22 La.L. Rev. 709, 744 (1962).

The willingness of this Court to overturn its own as well as State-established jurisprudential fiat which evolving social doctrine has discredited finds support in Louisiana's Civil Law System and the like ones derived from the European continent and the Roman Law.

> "We (in Louisiana) have never adopted *stare decisis,* and whatever chances it had of creeping into our system have been reduced to the

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[2]Ireland, *The Use of Decisions by United States Students of Civil Law.* 8 Tul.L. Rev. 358, 360(1934); Daggett, Dainow, Hebert, McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of La.* 12 Tul.L. Rev. 12 (1937).

> vanishing point by the passage of time. Our courts have always followed, and show every disposition to continue to follow, the essential civilian judicial technique of never letting today become either the slave of yesterday or the tyrant of tomorrow." Tucker, *The Code and the Common Law in Louisiana,* 29 Tul. L. Rev. 739, 759 (1955).

The history of constricted interpretation placed on Article 2315 has received the criticism of Louisiana commentators[3] and is not in accord with the civilian theories of interpretation nor with the interpretation given the source statute in the Code Napoleon[4] and is contrary to "natural law, reason or received usage", *La. Civ. Code,* Art. 21, which latter concepts should include a concept of equal protection.

> "The distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, cannot be made by those whose duty it is to interpret them." *La. Code,* Art. 20.

The entire tort doctrine of Louisiana was, and is, summed up in Article 2315:

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[3]E. g.: *Op. Cit.,* 14 Tul. L.R. 612 (1940) Supra note 1; Stone, *Tort Doctrine in Louisiana: The Concept of Fault,* 27 Tul. L. Rev. 1 (1952); Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law and in Louisiana,* 6 Tul. L. Rev. 201 (1931); Oppenheim, *The Survival of Tort Actions,* 16 Tul. L. Rev. 386, 412 (1942).

[4]Voss. *Op. Cit., supra.*

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Probably due to common law influences, Louisiana courts did not originally follow the French interpretation of Article 2315 (*Code Napoleon*, Art. 1372) so as to allow for wrongful death actions. *Hubgh v. N.O. & C. RR.*, 6 La. Ann. 495, 54 Am. Dec. 155 (1851). But following this case and Lord Campbell's Act (Fatal Accidents Act)[5], Louisiana began its long series of amendments to Article 2315 so as to allow recovery for wrongful death. The original concept of Article 2315 was to compensate those *immediately* dependent on the deceased, i.e. wife and minor children (La. Act 223 of 1855) but later, under a broadening "concept of fault",[6] recovery was allowed to all heirs — the idea being that the wrongdoer should pay.[7]

Statutes providing for a cause of action for wrongful death are based either on a strict inheritance theory whereby recovery is allowed certain enumerated heirs, or on a compensatory theory allowing recovery

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[5]9 and 10 Vict. 1.c. 93 (1846). It is not true, as has been contended, that one could not recover for wrongful death in early common law prior to Lord Campbell's Act; it was accomplished through a criminal appeal instituted by a victim's heir or wife. 3 Blackstone's Commentaries (Lewis ed. 1922) 119; Voss, *op. cit.*, note 3 at p. 208.

[6]Article 2315 is to be used as a "mirror of the times" not only reflecting concepts of "moral blameworthiness" but also "concepts of economic utility and social good." Stone, *op. cit.*, note 3, p. 18.

[7]The history of the amendments is found in West's L.S.A. - Civil Code, Art. 2315.

to those who have suffered a loss by the death of a loved one from whom support is expected. The better view is the latter one.[8] However, if the former be the case, then petitioner is entitled to recover since Billy Glona left neither wife nor child and his natural mother may inherit, *La. Civ. Code*, Art. 922.

In spite of the fact that Louisiana Courts have held the claim for wrongful death to be a property right, *Buie v. Hester*, 147 So.2d 733 (La. App. 2-1962), mothers of illegitimates have yet been precluded from recovery. The interpretation rendered by Louisiana Courts and followed by the Fifth Circuit below bespeaks discrimination of the rankest sort. No consideration is given to the question of dependence, support or even purpose. Petitioner is no less a mother because her child was illegitimate. Under Louisiana law, petitioner had all the obligations attendant on being a mother, *La. Civ. Code*, Articles 239, 240, 243 and 245.

Nowhere in Article 2315 is there a restricting definition of "mother". Articles 27 and 178 of the Civil Code do differentiate between "legitimate" and "illegitimate" children but not "parents" and Article 2315 doesn't even purport to so distinguish.

The obvious conclusion is that the Louisiana Courts have constructed classifications within Article 2315

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[8] Oppenheim, *Op. Cit.*, note 3, p. 429; Preamble to Lord Campbell's Act, *supra*, note 5; Comment, *Illegitimate children as Beneficiaries under Wrongful Death Acts*, 30 Yale L. J. 167, 168 (1920); Speiser, *Recovery for Wrongful Death*, iii, 12 (1966).

which are "constitutionally irrelevant"[9] and, therefore, unrecognizable.

B. ILLEGITIMACY — AN INHERENTLY SUSPECT CLASSIFICATION

This court has taken two approaches to equal protection; the first considers the classification itself. Some classifications are inherently unjustifiable, e.g. those based on race, creed or color. The classification made by Louisiana Courts in this type of case is one based on status or nativity. Petitioner submits that this type of classification is likewise inherently suspect and respondents must, but cannot, show an overriding justification as being "necessary to the accomplishment of some permissible state objective." *Loving v. Va.*, 388 U.S. 1, 6, 87 S.Ct. 1817, 1823 (1967). Classifications based on race, creed or color are not the only "inherently suspect" classifications.

> "[C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact." *Hernandez v. Texas,* 347 U.S. 475, 478, 74 S.Ct. 667, 670 (1954).

This Court has held that classifications based on

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[9] "The mere state of being without funds is a neutral fact-constitutionally an irrelevance like race, creed or color." *Edwards v. Calif.*, 314 U.S. 160, 184, 62 S. Ct. 164, 172 (1941) concurring opinion.

nationality — Mexican in *Hernandez;* Chinese in *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886); the status of being a serviceman, *Carrington v. Rash,* 380 U.S. 89, 85 S. Ct. 775 (1965); ancestry, *Hirabayashi v. U.S.,* 320 U.S. 81, 63 S. Ct. 1385 (1943) —are inherently suspect. c.f. *Kotch v. Board of Comm'r.,* 330 U.S. 552, 565, 67 S.Ct. 910, 916 (1947), dissenting opinion.[10]

Such a law "bears a heavy burden of justification . . . and will be upheld only if it is *necessary* and not merely *rationally related*" to the state purpose. *McLaughlin v. Florida,* 379 U.S. 184, 196, 85 S. Ct. 283, 290 (1964). (Emphasis supplied.)

The classification here is just as arbitrary and capricious as any stricken down by the Court. Legitimacy is no index to dependency nor to any other legitimate purpose of the Louisiana wrongful death statute. We submit it is not even an index to morality. By "fencing out"[11] illegitimates, the Louisiana courts discriminate against petitioner solely because of her status.

C. *ILLEGITIMACY HAS NO RELATIONSHIP TO THE WRONGFUL DEATH STATUTE.*

The second approach to equal protection taken by the Court, and apropos here, is the consideration of the

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[10]Dissent challenges the constitutionality of a regulation "which makes admission to the ranks of pilots turn finally on consanguinity."

[11]*Carrington v. Rash,* 380 U.S. 89, 94, 85 S. Ct. 775, 779 (1965)

classification made as it may be rationally related to the purpose of the statute. It isn't even suggested that Article 2315 was confected for the purpose of controlling pre-marital sexual relations or for the purpose of prohibiting the conception and birth of children out of wedlock. The obvious purpose was, and is, to provide a remedy for pecuniary losses occurring by reason of death. *Supra* pp. 9-10

Under this second test, therefore, classification is reasonable if it treats alike all those similarly situated in reference to the purpose of the statute. Those similarly situated should be similarly treated. *Smith v. Cahoon*, 283 U.S. 553, 51 S.Ct. 582, (1931).

The statute exempting carriers of farm produce from furnishing financial responsibility in *Smith v. Cahoon* violated the equal protection clause, not because the classification was an inherently suspect one, but because special treatment could not be afforded in the context of a statute purporting to protect the public against negligent carriers. In the same vein, 2315 type statutes do not have as their purpose the regulation of morality.

Viewed functionally, therefore, there is absolutely no basis for a court-imposed classification depriving illegitimates and the families of illegitimates of the beneficence of Article 2315 while allowing it to legitimates.

Over 100 years after the Louisiana wrongful death statute was enacted, the Louisiana Court stated that

the purpose of "fencing out" illegitimates "is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock." *Levy v. State*, 192 So.2d 193, 195 (La. App. 4 - 1966). The absurdity of this statement or 'reason' has been pointed up by those who have studied the matter.[12] It is made even clearer by the fact that petitioner, Mrs. Glona, has always been a Texas domiciliary and Texas treats her and her deceased son as legitimates for purposes of its wrongful death statute. Title 17 - *Vernon's Texas Civil Stat.*, Art. 4675, *Galveston H. & S. A. Ry. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705, 706 (1907). It was only a fortuitous event that petitioner's child was killed in Louisiana rather than in Texas.[13] If Louisiana policy underlying Article 2315 is what its courts say it is, then it would certainly be inapplicable to petitioner. She could not possibly be considered to have indulged in her pre-marital intercourse with Louisiana law in mind. Thus, in *Chivers v. Couch Motor Lines, Inc.*, 159 So2d 544 (La. App. 3-1964) the Louisiana court allowed recovery for a Louisiana wrongful death by a Florida "com-

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[12]Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 Ind. L. J. 193, 220 (1967); Krauss, *Equal Protection for the Illegitimate*, 65 Mich. L.R. 477, 491 (1967); Krauss, *The Non-Marital Child — New Conceptions for the Law of Unlawfulness*, 1 Fam. Law Qtrly 1. (ABA-Je, 1967).

[13]This case further points up that the status and rights given to petitioner under her *lex domicilii* are taken away by Louisiana's *lex delicti*. cf. *Richards v. U.S.*, 369 U.S. 1, 82 S.Ct. 585 (1961); *Comment, Babcock v. Jackson* 63 Cal. L.R. 1219 (1963); Currie, *The Disinterested Third State*, 28 Law & Cont. Prob. 754 (1963); Currie, *Survival of Action: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. R. 205 (1958).

mon law" wife, belying any public policy of this state against recovery by illegitimate families.

The fact is that the reason enumerated by the *Levy* court is no reason at all. The real reason is simply pure prejudice based on tradition. Like segregation, tradition is not the constitutional answer, it is not evidence of a rationally valid classification but only of practice. Justice Holmes' statement that a given statute was "the outcome of a thousand years of history"[14] was used not to justify but explain the regulation which he would nevertheless have sustained on other grounds.

The present case fails to meet the purpose-classification test. This test was perhaps best explained by Justice Jackson:

> "As a matter of principle . . . I do not think that differences of treatment under law should be approved on classifications because of differences unrelated to legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those let free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance." *Rwy. Exp. v. N.Y.* 336

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[14] *Hoeper v. Tax Comm.*, 284 U.S. 206, 219, 52 S.Ct. 120, 123 (1931); Holmes, *The Common Law*, 73.

U.S. 106, 115, 69 S. Ct. 463, 468 (1949) concurring opinion.

The same functional approach has been followed by this Court in *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344 (1957) (relied upon only to cite it by the Fifth Circuit in the instant case), *App.* 17; and in *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, (1942) and *Gulf v. Ellis*, 165 U.S. 150, 17 S.Ct. 255 (1897).

Nor has the criteria in *Skinner* ever been considered by Louisiana Courts or by the Fifth Circuit. Certainly here, as in *Skinner*, all persons similarly situated are not brought within the law. *Skinner v. Oklahoma*, 316 U.S. at 541. See also Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. L.R. 341, 353 (1949).

If "law reflects distinctions that exist in fact"[15] what difference can be made out for the treatment of mothers of legitimates *vis a vis* mothers of illegitimates? Article 2315 is not used to punish or discourage adulterous relations. In the ordinary sense a married woman who gives birth to a child not the result of a union with her husband — produces nonetheless an illegitimate child. But Louisiana again dwells on fictions and conclusively presumes the child to be legitimate as long as the mother is married. *La. Civ. Code* Arts. 27, 179 and 184. *Harris v. Illinois Cent. R. Co.*, 220 F. 2d 134 (CA 5 Cir. - 1955).

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[15]Frankfurter, J., *concurring* in *Morey v. Doud*, 354 U.S. at p. 472.

The reasons of the Louisiana Courts simply do not work. Louisiana has experienced growth in its illegitimacy rate and figures,[16] and the rate of growth of illegitimates is greater in Louisiana than the national growth rate.[17] The sum and substance is that Louisiana Courts have used a statute (Article 2315) having one set of purposes as a vehicle for achieving discrimination based on wholly different criteria. In other areas, Louisiana has been careful not to discriminate against illegitimates probably for fear of dubious legality. For example, the state makes no distinction between illegitimates and legitimates where incest is concerned. LSA-R.S. 14:78. Kill the mother of an illegitimate and one suffers the *criminal* consequence. Louisiana illegitimates and mothers of them inherit one from the other. *La. Civ. Code*, Arts. 918, 922. However, the State draws the line at that point and absolves the killer of an illegitimate from all civil liability to his mother. There is an open season on bastards.

Had the defendants in this case killed a cow belonging to Mrs. Glona, she could recover in Louisiana Courts[18] but not for the death of a child whom she gave birth to and nurtured an dsupported. Moneover, if Billy Glona owned a cow that was killed by defendants and he subsequently died, petitioner would inherit his claim for the loss of the cow. "The right to recover damages to property. . . is inherited by . . .

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[16]See appendix A, *infra*.

[17]*Ibid.*, In 1960 Louisiana had 91.5 illegitimate births per thousand live births and United States had 52.7. In 1964 Louisiana had 111.2 and the United States, 68.5.

[18]*Sturm v. Hutchinson*, 37 S.2d 45 (La. App. 1-1948)

irregular heirs." *La. Civ. Code*, Art. 2315. Natural mothers are irregular heirs. *Ibid.*, Art. 922.

The solution to this case is not charity but justice. No one can be so wanting in candor as to deny that the stigma and occurrence of illegitimacy affects primarily the poor,[19] which for both mother and child generates "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Ed.*, 347 U.S. 483, 494, 74 S. Ct. 686, 691 (1954).

And to make the poor poorer by denying them the right to recover for losses suffered by reason of the death of another is the denial of justice.[20]

Every jurisdiction of the United States in some manner allows illegitimates to inherit from their mother and vice versa. Note, *Illegitimacy*, 26 Brooklyn L. R. 45, 82 (1959), Ten states by statute, specifically authorize a mother of an illegitimate to recover for his wrongful death.[21] Other states have interpreted

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[19] See tenBroek *California's Dual System of Family Law*, 16 Stanf. L. R. 257 & 900 (1964); 17 Stanf. L. R. 614 (1965).

[20] "In an established and well ordered state rectificatory justice is equality before the law, civil and criminal" McKeon, R., *Justice and Equality* NOMOS VI (Prentice Hall-1963) 58.

[21] Arizona, Ariz. R. S. Ann. 12-612, 14-206; Georgia, Ga. Code 105-1307; Maryland, Md. Code Ann. Art. 67§4; Florida, FSA § 768.01-03 (1965); Mississippi, Miss. Stat. § 1453; So. Carolina; S.C.Stat. §10-1953; Tennessee, Tenn. Code Ann. §20-607(1965); Washington, R.C.W.A. §4.20.005; West Virginia, W.Va. Code §5474, 4084; Oregon, Ore. Rev. Stat. 30.010, 109.060.

their wrongful death statutes so as to allow it.[22] Louisiana is the only state that refuses, by its jurisprudence, to allow recovery. (Some states have not decided the question.)

Louisiana in the analagous situation of Workmen's Compensation allows a natural mother to recover for the death of her illegitimate child. LSA-R.S. 23:1231, 1252, 1253; *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1945); Note, *Workmen's Compensation, Illegitimate children*, 20 Tul. L.R. 145 (1945).

The *Thompson* court reasoned that if the legislature had considered it against public order to allow illegitimates recovery under the workmen's compensation statute, it would have expressly set it forth in the statute. The same reasoning should have and could have been applied to the wrongful death statute. There is no rhyme or reason for not doing so, but not to do so deprives the parent in the instant case of that which all other parents are entitled.

The invidious discrimination is further characterized by the fact that an employer of an illegitimate may recover by way of subrogation for compensation

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[22] E.g. *Sou. Ry. Co. v. Carlton*, 118 So. 458 (Ala. 1928), *Stoneburner v. Theodoratus*, 30 P.2d 1001 (Cal. App. 1934), 31 P.2d 1042 (1934); *Huddleston v. Henderson*, 181 Ill. App. 176 (1913); *Marshall v. Wabash Ry.*, 120 Mo. 275, 25 S.W. 179 (1894); *Porsberg v. Klien*, 39 Ohio L.A. 470, 53 N.E. 2nd 63 (1944); *Galveston v. Walker*, 48 Tex. Civ. App. 52, 106 S.W. 705, (1907); *Andrzcjewski v. Northwestern Fuel Co.*, 158 Wisc. 170, 148 N.W. 37 (1914). Some states refer to their laws on intestacy and as has been pointed out all states bring mothers of illegitimates within their intestacy provisions.

paid to his dependents against third party tort feasors even though the illegitimate family may not. In *Thomas v. Matthew Lumber Co.*, 201 S. 2d 357 (La. App. 2-1967) the employee was killed during the course of his employment. His employer paid compensation benefits to the decedent's common law wife (non-recognizable in Louisiana) and several illegitimate children. The court allowed the employer to recover against the tort feasor by way of subrogation although refusing the right to the illegitimate family. *Accord. Port of N.O. v. City*, 223 La. 199, 65 So. 2d 313 (1953).

Federal legislation in analagous fields has allowed illegitimate children in most instances to recover for the death of their natural parents[23] and where applicable there has been no denial of the right of natural parents to recover. The Jones Act, 46 U.S.C. 688, has been interpreted so as to allow even an aunt, who stood in *loco parentis* to a seaman, to recover.[24] It has been held repeatedly that illegitimate children recover under the Jones Act as well as the Death on the High Seas Act (46 U.S.C. 761). *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326, 330 (2 Cir. 1934), *cert. den.* 293 U.S. 579, 55 S.Ct. 89 (1934); *Civil v. Waterman*, 217 F. 2d 94 (1954); *Hassan v. A.M. Landry & Son, Inc.*, 321 F.2d 570 (5 Cir. 1963), *cert. den.*, 375 U.S. 967, 84 S.Ct.

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[23]Note, *The Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 337 (1962); Note, *Illegitimates: Definition of Children Under Federal Welfare Legislation*; 67 Col. L. Rev. 984 (1967); Comment, *The Illegitimates Right to Benefits Accruing Upon the Death of his Parents*, 28 La. L. Rev. 110 (1967).

[24]*In Re Panama Transp. Co.*, 98 F. S. 114 (D.C.N.Y. 1951), aff'd. 195 F. 2d 104.

486 (1963). The Federal Employer's Liability Act (45 U.S.C. 51) has repeatedly embraced illegitimates. *Huber v. Baltimore*, 241 F.S. 646 (D.Md. 1965); *Hammond v. Pa. R.R. Co.*, 31 N.J. 244, 156 A.2d 689 (1959); *Tune v. L & N RR. Co.*, 223 F.S. 928 (D.Tenn. 1963).

The Social Security Act, 42 U.S.C. 416(h) (2), (3); Veterans Legislation, 38 U.S.C. 101(4); and the Foreign Service Act, 22 U.S.C. 1064(3) all include illegitimates within their extending provisions. And the Federal Employee's Group Life Insurance Act (5 U.S.C. 2093) has been interpreted in such a way as to grant coverage to illegitimates even if the state law of intestacy did not recognize the illegitimate. *Metro Life Ins. Co. v. Thompson* 368 F.2d 791 (3 Cir. 1966). The approach has been to construe these types of statutes so as to accomplish the intended purpose, i.e. compensation for loss of expected support and love.

The overwhelming conclusion to be drawn is that Louisiana courts can find no "necessary relation", no "rational foundation", no "overriding purpose" independent of discrimination to justify the classification asserted. It is by these standards, however, that the classification must be measured and from the viewpoint that only recently in the history of this nation are the demands of the Constitution being applied to the poor from which group the largest portion of illegitimate families spring.

It may be argued that the "fencing out" of the mother is no more reasonable than the same treatment of the father and to allow recovery by the latter may

induce and encourage fraudulent claims in such number and difficulty as to unduly burden the Courts. But this addresses itself to the problem of proof only, and we are in accord that the burden of proof upon the male contender to illegitimate parenthood should be stringent. But we are not here faced with that problem, and the easily proven maternity should not bear the problems inherent in obverse situations.

Nor should this Court be unduly constricted by, nor solicitous of, the Louisiana courts rulings in construction of the underlying statute. This Court is here presented with a legal system whose fundamental tenet contravenes the continued adherence to a weak or erroneous statutory construction,[25] especially where that construction serves to give the protections and benefits of law to one class and deprive those protections to another based on no distinction in fact.

The import of the Louisiana approach to this problem is such as to deny to petitioner the factual status of being a "person". The Fourteenth Amendment refuses to allow such fictions to be used to deny equal protection of the law.

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[25] "Law is a solemn expression of legislative will." Art. 1, La. Civ. Code.

"The words of a law are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words." Art. 14, La. Civ. Code.

" 'child' :4a:a son or a daughter: a male or female descedent in the first degree: the immediate progeny of human parents." Webster's Third New International Dictionary (1961) p. 388.

" 'parent' 1a: one that begets or brings forth offspring: father, mother" *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals and the Federal District Court should be reversed.

Respectfully submitted,

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CERTIFICATE

A copy of the foregoing brief has been served on Mr. Frank Normann, Esq., Normann and Normann, attorney for respondents, 1605 Hibernia National Bank Bldg., New Orleans, Louisiana, 70112, by mailing same to him postage prepaid this _____ day of January, 1968.

_____

APPENDIX A

Table of Total Live Birth and Total Illegitimate Births United States[1] and Louisiana[2]

	LIVE BIRTHS		ILLEGITIMATE BIRTHS			
			United States		Louisiana	
Year	United States (000)	Louisiana	Total	Rate Per 1000 Live	Total	Rate Per 1000 Live
1940	2,559	50,916	89,500	34.9	4,200	82.3
1945	2,858	57,838	117,400	41.1	4,893	84.5
1950	3,632	76,731	141,600	38.9	6,173	84.5
1955	4,104	88,553	183,300	44.6	7.067	79.9
1960	4,258	90,126	224,300	52.7	8,248	91.5
1964	4,027	86,000	275,700	68.5	9,567	111.2
1965	3,767	79,533	N.A.	N.A.	9,493	119.4
1966	N.A.	78,121	N.A.	N.A.	9,700	125.6

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[1]Source: U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966 (87th ed.) pp. 46-49.

[2]Source: La. State Board of Health, Annual Statistical Reports 1940-1967; STATISTICAL ABSTRACT OF LOUISIANA (LSUNO Press 1965).

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

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BRIEF ON BEHALF OF RESPONDENTS.

ARGUMENT.

MAY IT PLEASE THE COURT:

I. There Is No Federal Law In The Area Of Domestic Relations, Which Is Primarily A Matter Of State Concern.

It has been repeatedly held by this Court that there is no federal law of domestic relations and that the status of a party, even with respect to rights created by Federal Statutes, has to be determined by state law.

In the case of *Seaboard Airline Ry. v. Kenney*, 240 U.S. 489, 36 S.Ct. 458 (1916), in passing upon rights

conferred by the Federal Employers' Liability Act, this Court held:

> "There can now be no question that the act of Congress in so far as it deals with the subjects to which it relates is paramount and exclusive. It is therefore not disputable that recovery under the act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action. * * * But this is irrelevant, since the controversy concerns only the meaning of the act, which it is conceded, when rightly interpreted, is entitled to exclusive operation.
>
> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government, who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law." 240 U.S. at 493-494, 36 S.Ct. at 459-460.

Again, in *De Sylva v. Ballantine,* 351 U.S. 570, 76 S.Ct. 974 (1956), in deciding who were "children" within the meaning of the Federal Copyright Act, 17 U.S.C. §24, this Court held:

> "We come, then, to the question of whether an illegitimate child is included within the term

'children' as used in §24. The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. Cf. Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 66 S.Ct. 922, 90 L.Ed. 1172; Board of County Commissioners v. United States, 308 U.S. 343, 351-352. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." 351 U.S. at 580, 76 S.Ct. at 980.

Finally, in the case of *Bell v. Tug SHRIKE*, 332 F.2d 330 (4th Cir., 1964), cert. den. 379 U.S. 844, 85 S.Ct. 84, this Court refused to review the judgment of the Court of Appeals for the Fourth Circuit which had held that a woman, who had entered into a bigamous marriage was not a "widow" under Virginia law and, therefore, not entitled to recover under the Jones Act.

Inasmuch as the legal status of the parties, even under federal acts, is governed by state law, it follows that the federal courts are bound by the decisions of the state courts defining the legal status of parties with respect to rights created by state law.

REPLY TO ISSUES RAISED BY PETITIONER.

I.

Petitioner's contentions that the interpretation accorded Article 2315 of the Louisiana Civil Code is contary to Civilian theories of interpretation and is in violation of the Fourteenth Amendment to the United States Constitution are without merit. These contentions will be answered in the order presented by the petitioner.

A. Introduction—Louisiana Approach.

The argument advanced by petitioner under this heading seems to be based on the allegation that the Louisiana courts, in denying recovery to illegitimate relations, have blindly adhered to *stare decisis* and have failed to interpret Article 2315 in light of "evolving social doctrine."

This argument is unsound as the very statutory law, Article 20 of the Louisiana Civil Code, cited by petitioner in support thereof, specifically prohibits the court from extending and/or narrowing a law by judicial construction. Article 20 provides that:

> "The distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, cannot be made by those whose duty it is to interpret them."

An interpretation by the court extending Article 2315 of the Louisiana Civil Code so as to confer rights

thereunder upon parents for the death of their illegitimate children and/or upon illegitimate children for the deaths of their parents and/or in favor of any other illegitimate relation would be in clear violation of the legislative mandate set forth in Article 20.

That the Louisiana courts, in denying recovery in such cases, have not relied upon *stare decisis*, but on the statute itself, Article 2315 of the Louisiana Civil Code, is evidenced by the recent decision in the case of *Abraham v. Connecticut Fire Insurance Company*, 177 So. 2d 295 (La. App., 1965) wherein the Court stated:

> "The Statute being sui generis, this court is not at liberty to question the wisdom of the legislature in confining, restricting and limiting the benefits of the law to those classes of relations expressly enumerated. Conceding the authority of the legislature to include illegitimate relations within the scope of the statute if that body so desires, it nevertheless remains it has not as yet seen fit to do so. We can only conclude, therefore, that the legislature did not intend to extend to illegitimate or natural brothers and sisters the initial right of survivorship of those actions as encompassed in subject statute." 177 So.2d at 302.

Also, in the case of *Cheeks v. Fidelity & Casualty Company*, 87 So. 2d 377 (La. App.), decided in 1956,

the Court re-examined Article 2315 and, in denying recovery to natural parents for the death of their illegitimate son, declared that:

> "Since Lynch v. Knoop, supra, Article 2315 has been amended upon several occasions and the language used therein has never been enlarged or changed to include natural parents. This is indicative that our legislature was in accord with the judicial interpretations of the words used therein and did not desire to broaden them."

The legislative history of Article 2315 of the Louisiana Civil Code discloses that the statute has been amended a total of seven times[1] since its first enactment in 1855.[2] All of these amendments were designed to broaden the rights provided thereunder or to enlarge the class of beneficiaries. Notwithstanding the fact that the Louisiana courts have held consistently, since 1907,[3] that Article 2315 does not create a right or cause of action in favor of a natural mother for the death of her illegitimate child, no amendment has been made with reference thereto thus indicating that the courts have complied with the legislative intent of the statute.

In the case of *Lynch v. Knoop,* 118 La. 611, 43 So. 252 (1907), the court, in holding that a natural mother

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[1] In 1870, 1884, 1908, 1918, 1932, 1948 and 1960, see History and Text of Former Codes, West's L.S.A. Civil Code, Vol. 9 at pp. 84-85 and 1966 Cumulative Annual Pocket Part at pp. 11-12.

[2] La. Act 223 of 1855.

[3] The first case so holding was *Lynch v. Knoop,* 118 La. 611, 43 So. 252, decided in 1907.

may not recover for the death of her illegitimate child, stated as follows:

"In her petition the mother declared to the court that her child had been killed. If the maternity of a child may be acknowledged after the death of the child, it remains that, considered as a child acknowledged, she was not thereby legitimated. Even if the child has been acknowledged, the mother is not entitled to stand in judgment. A child must have been legitimated in order that the mother may stand in judgment. Was the child legitimated? It was not. Our reasons are the following:

The right of action, under Act No. 71, p. 94, of 1884, survives in the surviving mother and father. 'The right of this action shall survive in case of death in favor of the minor children.' Id.

This does not include the natural mother and natural father.

The articles of the Civil Code regarding the mother of legitimate children all refer to a lawful mother. The article of the Code relating to natural mothers and natural fathers is separate from those relating to the lawful mother and father.

The two, the mother and the natural mother, are treated in the Code differently or from a different point of view; one from the point of view that she has a natural right, the other that it is a

statutory right extending no further than the terms of the statute.

The following are some of the marked differences between the natural child and the legitimate child: The natural heir is to be recognized and to be placed in possession under special provisions of the law. He is a stranger to the succession from which he inherits until permission is obtained to exercise the right of an heir. It is different with the legitimate heir.

Originally the right to damages for personal injuries was not heritable. The statute has to some extent made it heritable, but it does not express the intention to include the natural mother as a person in whom the right survives, and without some expressed declaration in that respect it cannot be considered as secured under the terms of the statute. The terms of the act cannot be extended so as to include a natural mother or a natural offspring.

Legitimate relationship was the legislative intent.

The right does not survive in the mother further than it does in the natural child. Civ. Code, Art. 3556, No. 8.

Natural children, though recognized, are not children properly so called. The same is a logical conclusion as relates to the mother of the natural child."

Likewise, the Louisiana courts have held that under Article 2315 an illegitimate child has no right or cause of action for the death of its parent. *Levy v. State of Louisiana*, 192 So. 2d 193 (La. App., 1966), presently pending before this Court.[4]

Since Article 3556[5] of the Louisiana Civil Code of 1870 specifically excludes illegitimate children from the definition of "children"; there can be no question that the term "child", referred to in Article 2315, does not include illegitimate children.

Counsel for petitioner's argument that a natural mother should be granted recovery for the death of an illegitimate child simply because Article 2315 does not state "legitimate" father or "legitimate" mother is manifestly unsound and would result in an unconstitutional application of the statute. Under such reasoning, an illegitimate child would be precluded from asserting a cause of action for the death of its mother (see Article 3556, footnote 5), but a mother would be permitted to recover for the death of her illegitimate child, a result manifestly unconstitutional as denying one illegitimate recovery while granting it to another illegitimate. Considering that the illegitimate status of the child is created by the mother, such a suggested result is not only unconstitutional but grossly inequitable.

[4] No. 508 on the docket of this Court, October Term 1967.

[5] 3556 (8) Children.—Under this name are comprehended not only the children of the first decree, but the grandchildren, great-grandchildren, and all other descendants in the direct line. *Natural* children, even though recognized, make no part of the children properly so called, unless they have been legitimated.

B. Illegitimacy—An Inherently Suspect Classification.

While the Louisiana Civil Code classifies legitimates and illegitimates not only with respect to rights granted under the Wrongful Death Statute, but primarily in the area of descent and distribution, Louisiana has enacted a number of laws designed to elevate the illegitimate to legitimate: (1) A mother, giving birth to an illegitimate child, may legitimate the same by entering into a marriage with the father of the child and by formally or informally acknowledging the child. Louisiana Civil Code of 1870, Article 198. (2) Petitioner, even if unable to marry the father of her illegitimate son, could have legitimated the son by an act of legitimation passed before a notary and two witnesses. Louisiana Civil Code of 1870, Article 200; Louisiana Revised Statutes, Title 9 Section 391. (3) Petitioner and her husband Otto W. Glona, who is not the father of the child (A. 8) could have adopted the child, thereby conferring legitimate status upon him. La. Civil Code, Art. 214; La. R.S. Title 9 Sections 421 et seq.

The enactment of these statutes completely refutes petitioner's argument that Louisiana has engaged in purely prejudicial practices against illegitimates. On the contrary, realizing that legitimate relations form the basis of civilized society, Louisiana has protected the rights of legitimates against the claims of illegitimates. However, to balance the scales, Louisiana has done everything in her power to enable the natural parent to confer legitimate status upon his

or her illegitimate child, thereby correcting the moral wrong visited upon the child by the parent. Thus, petitioner's inability to assert a cause or right of action for the death of her illegitimate son resulted from her own actions and not those of the state legislature.

It is well established that a state has the right, under the Constitution, to enact legislation to protect the health, morals and general welfare of its citizens, which includes the right to legislate in the area of sexual conduct. *McLaughlin v. State of Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964).

It is further established that the equal protection clause of the Fourteenth Amendment permits the state to classify, the only requirement being that the classification is based upon some reasonable basis. As was stated in *Morey v. Doud*, 354 U.S. 457, 463-464, 77 S.Ct. 1344, 1349 (1957):

> "The rules for testing a discrimination have been summarized as follows:
>
> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice

it results in some inequality. 3. When the classification in such a law is called in question if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-79, 31 S.Ct. 337, 340, 55 L. Ed. 369.' "

Under the foregoing authorities, the issue before the Court is whether or not the classification into legitimates and illegitimates for purposes of the Louisiana Wrongful Death Statute has any reasonable basis at all or is based upon "pure prejudice" as argued by plaintiff. Petitioner bears the burden of proving that the law does not rest upon any reasonable basis at all, and such burden is certainly not satisfied by quoting statistics showing an increase in the illegitimacy rate and by merely labelling the law as prejudicial.

That Louisiana has not engaged in any prejudicial practices against illegitimates is amply supported by the fact that it has enacted various laws designed to encourage the elevation of an illegitimate to the status of a legitimate child, such as legitimation and adoption. In 1948 the legislature amended Article 198 of the Louisiana Civil Code to permit the legitimation of adulterous bastards, thus evidencing a policy

geared towards bringing the illegitimate into a legitimate family relationship.

By the same token, Louisiana, as any other state has a legitimate interest in protecting the general welfare and morals of its citizens, in preserving the family unit, protecting the marital relationship and in discouraging "bringing children into the world out of wedlock." *Levy v. State*, 192 So. 2d 193 (4th Cir., 1966). In enacting such laws, the State is allowed wide discretion. As was stated in the recent case of *McLaughlin v. State of Florida*, 379 U.S. 184, 191, 85 S.Ct. 283, 288 (1964):

> "Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious."

In the case of *McGowan v. State of Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105 (1961) the Court in passing upon the constitutionality of the Maryland Sunday closing law, held that:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide discretion in enacting laws which affect some groups of citizens differently than others. The constitu-

> tional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.
>
> *A statutory discrimination will not be set aside if any state of fact may be conceived to justify it.*" (Emphasis supplied.)

In the *McGowan* case, *supra*, the Supreme Court held that:

> "a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day."

In the instant case, we submit that the classification into legitimates and illegitimates is reasonable in furtherance of the State's interest in promoting legitimate relationships and discouraging illegitimacy, and such classification certainly is not "wholly irrelevant" to the legislative purpose.

A system which would extinguish any classification between legitimates and illegitimates would undermine and endanger, if not destroy, the legal institution of marriage and the family unit, which gives moral support and stability to society in general. The principle that legislation for the protection of the fam-

ily is not only reasonable, but is necessary and desirable, was forcefully stated by this Court in the case of *Murphy v. Ramsey*, 114 U.S. 15, 45, 5 S.Ct. 747, 764 (1885) as follows:

> "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, * * * than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization."

C. Illegitimacy Has No Relationship To Wrongful Death Statute.

Petitioner urges that Article 2315 was enacted solely for the purpose of providing "a remedy for pecuniary losses occurring by reason of death" and that, consequently, this remedy should be available to all persons damaged irrespective of their legal status. Carrying this argument to its logical conclusion, anyone who has sustained a financial loss by reason of another person's death, be it a partner in a successful business, a dependent friend not related to a decedent, a charitable institution generously supported by a decedent, would be entitled to claim damages. Such is simply not the law either in Louisiana or in any of the other forty-nine states. All Wrongful Death Statutes, although differing from state to state, des-

ignate statutory beneficiaries.[6] Persons, who do not possess the necessary legal status, even though dependent, are precluded from recovery. This is true even under the Jones Act, 46 U.S.C. Section 688. In the case of *Bell v. Tug SHRIKE*, 332 F.2d 330 (4th Cir., 1964), cert. den. 379 U.S. 844, plaintiff claimed that she was entitled to be recognized as the deceased seaman's widow under the Jones Act based upon the following facts:

> "It is undisputed that John Ware Bell was married on three different occasions in the course of his lifetime. First, he contracted marriage in 1940, which was dissolved by divorce in June, 1951. He entered into his second marriage one week later, but he and his second wife were separated in 1954 and this marriage also was ended by divorce, on September 18, 1957. At issue in this case is a ceremonial marriage of the seaman to the appellant in Mathews County, Virginia, on December 13, 1956, when he was still legally married to the second wife. Between the date of the last-mentioned marriage and September 12, 1959, when the Tug SHRIKE capsized in the Chesapeake Bay, causing John Ware Bell's death, he and the appellant lived together in Norfolk, Virginia, and held themselves out to the community as husband and wife."

Plaintiff maintained that, although her marriage to the decedent was bigamous, a valid common-law marriage was created once the impediment was re-

[6] 22 Am. Jur. 2d "Death", Sections 47-48.

moved by divorce in 1957. The Court of Appeal held that there is no federal law of domestic relations and that since Virginia did not recognize a common-law marriage, plaintiff was not entitled to be recognized as the widow of the decedent under the Jones Act. The Court further stated as follows:

> "There is a certain appeal in the argument of the appellant that if she was actually dependent upon the deceased seaman she should be entitled to recover, especially as there is no other woman claiming as a widow. But the statute does not spread its benefits broadly according to dependency. Relationship is an essential factor under the statute, which speaks of a 'surviving widow.' Neither express language nor the term 'widow' in its ordinary use qualifies the survivor of a bigamous marriage as a widow. If the statute made only pecuniary loss the test rather than relationship, we would have a different case.* * *.
>
> While it is true that in the present instance no other woman is competing with the appellant for a share in the settlement fund, a decision according the appellant standing could operate to the detriment of claimants such as parents or next of kin in future cases." 332 F.2d at 336.

Thus it is seen that the right of recovery, even under the Jones Act, is not based upon dependency or restitution of damages, but is based upon the relationship required by the statute. Article 2315 has designated certain classes of beneficiaries who may assert a

cause of action for wrongful death. Loss of love and affection and loss of support are not the criteria which determine if a party has a cause and right of action. The only criterion is that a legal and legitimate relationship and, thus, the required status exists.[7]

Petitioner contends that the recovery awarded a Florida "common law" wife for a Louisiana wrongful death in the case of *Chivers v. Couch Motor Lines, Inc.*, 159 So. 2d 544 (La. App., 1964) belies "any public policy of this state against recovery by illegitimate children." In designating the children of a Florida common law marriage as "illegitimate", petitioner apparently overlooks that a common law marriage, where recognized, is as valid as a ceremonial marriage,[8] and the children of such marriage are legiti-

[7] By innuendo, petitioner is advancing the theory that Texas law should be applied in determining petitioner's status. (See p. 14 of Petitioner's brief.) This argument was not advanced in the trial court and when petitioner attempted to urge it on appeal, the Court of Appeal held: "Plaintiff argues for the first time on this appeal that the granting of the Rule 56 motion was erroneous for the reason that the laws of Texas should be applied in determining whether or not she has a right of action against defendants. Plaintiff's theory that the law of Texas should be applied even though the injury and death occurred in Louisiana is that, by reason of plaintiff's domicile, Texas has a more significant relationship with the occurrence than Louisiana, such an argument at this point is foreclosed. Upon being met with defendant's motion for summary judgment, plaintiff was authorized by Rule 56 to develop factually that the law of the domicile had a more significant relationship with the occurrence than the *lex loci delicti*. Plaintiff failed to do this, and such an issue was not raised upon the submission to the District Judge." (A. 16-17.)

[8] 55 C.J.S. Marriage, §6, pp: 816-819: "A common-law marriage may be briefly described as a marriage without formal solemnization, or without formalities. * * * Where recognized, common-law marriages are as fully valid as ceremonial marriages."

mate children. Thus, the plaintiff in the *Chivers* case, *supra*, was the legal wife of the decedent and her children were legitimate.

Petitioner next urges that Louisiana "dwells on fiction" in permitting recovery for the death of a child born to a married woman, although not of the union with her husband, but denying recovery for the death of a child born to an unmarried woman. Petitioner contends that "in the ordinary sense a married woman who gives birth to a child not the result of a union with her husband produces nonetheless an illegitimate child." (See p. 16 of petitioner's brief.) This argument, rather than supporting petitioner's claim that the State of Louisiana pursues a policy of prejudice against illegitimates, actually reflects the State's genuine concern and solicitude for the welfare of these children by considering them to be legitimate, Louisiana Civil Code of 1870, Articles 179, 184-192, even though they may be "in the ordinary sense illegitimate."

The reasonableness of the interpretation of Article 2315 in denying recovery for the death of illegitimate relations has to be considered in context with the policy of this State to encourage and protect legitimate relationships, to ensure the stability of the laws relating to succession and transfer of property rights and last, but not least, to discourage undesirable sexual conduct. This policy of the State is evidenced in the laws protecting children born to a married woman against bastardization. La. Civil Code of 1870, Article 184.

It is evidenced in the laws providing for forced heirship for legitimate relations, such as children and mother and father, La. Civil Code of 1870, Arts. 1493, 1494 and 1495.

It is evidenced in the laws providing for the establishment of a marital community of acquets and gains and protecting the rights of the spouses to the property acquired during the existence of the marriage, La. Civil Code of 1870, Article 2399 et seq., and by granting to the surviving spouse a usufruct on the property owned by the decedent, La. Civil Code of 1870, Art. 916.

It is evidenced in the laws of descent and distribution which protect the rights of legitimate children against the claims of illegitimates. La. Civil Code of 1870, Arts. 200, 918.

It is further evidenced by the Louisiana Workmen's Compensation Act, which does not recognize the natural parents as "mother" and "father",[9] and does not recognize an illegitimate child as a "child" within the definition of the Act, unless such child is *formally* acknowledged.[10] Again, the State has balanced the interests of the legitimates and the illegitimates with respect to rights accruing under the Workmen's

[9] *Ellis v. Union Compress & Warehouse Co.*, 178 So. 726 (La. App., 1938).

[10] La. R.S. 23:1021(3) "'Child' or 'children' covers only legitimate children, stepchildren, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204 and 205." Also, Fidelity and Casualty Co. of New York v. Ivory, 129 So.2d 894 (La. App., 1960).

Compensation Act. La. R.S. 23:1021 et seq. Since the Act is remedial legislation and is liberally construed, such persons, although not entitled to recover as "mother", "father" or "child" respectively, are entitled to recover as "dependents", *provided* the claims of the legitimate relations do not exhaust the statutory limit. See, *Fidelity and Casualty Co. of N. Y. v. Ivory*, 129 So. 2d 894 (La. App., 1960):

> "Hence we conclude and so hold that the compensation payable in the instant case shall be payable to, and for the use and benefit of, the three legitimate minors until they attain their eighteenth birthdays or until compensation payments are otherwise terminated as to them or any of them; and that, accordingly, as and when the maximum compensation payable is not consumed by the members of that class of claimants, then the difference or the remainder shall be payable to, and for the use and benefit of, the illegitimate dependents until the expiration of the statutory period of 400 weeks."

Thus, when considered in conjunction with those laws, it is apparent that the interpretation accorded Article 2315 is not only reasonable but is imperative to protect and preserve the integrity of the general laws governing marital and other legitimate relationships and to regulate the property rights flowing therefrom.

Petitioner's contention that she is an irregular heir of her deceased child is erroneous. A natural mother can only inherit from her illegitimate son if she

has formally acknowledged him. *Succession of Lacosst*, 142 La. 673, 77 So. 497 (1918). Petitioner only "informally acknowledged" the deceased. (A. 14.)

It is further urged by petitioner that Louisiana law permits an employer who has paid compensation benefits to the illegitimate children of the deceased worker to recover the payments from the tortfeasor, thus giving rights to an employer which are denied to the mother of an illegitimate child. This contention is not well founded. The employer has an independent right of action to recoup such payments, which right of action is not based on legal subrogation, but is an independent right which can be asserted through a direct suit against the tortfeasor. *Board of Com'rs. v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953). The Wrongful Death Statute and the Workmen's Compensation Act were enacted for different purposes, confer different rights and are subject to different construction. One was enacted in derogation of common and civil law and is limited to legitimate relations; the other is remedial legislation, is liberally construed and encompasses dependent illegitimates under certain conditions.

In attacking the classification of legitimates and illegitimates as invidious discrimination, petitioner completely ignores the fact that, under Louisiana law, a parent of an illegitimate child has almost unlimited power to confer legitimate status upon the child. In 1948 the legislature amended Article 198[11] of

[11] Act 482 of 1948.

the Louisiana Civil Code to permit the legitimation of adulterous bastards. Consequently, any disadvantages visited upon the mother of an illegitimate child do not result from the classification made by the State, but result solely and only from the failure of the parent to confer legitimate status upon the child. While the legislature has provided for a re-classification by simple and expeditious means, the parent alone has perpetuated the illegitimate status of the child.

CONCLUSION.

There is no federal law in the area of domestic relations, nor does the Constitution prohibit reasonable classification. The State has the absolute and final authority to determine the legal status of persons with respect to rights conferred under the Wrongful Death Statute as well as with respect to descent and distribution and transfer of property. The requirements of due process and equal protection are satisfied by the enactment of state laws permitting persons to acquire legitimate status and all rights flowing from such status.

It is submitted that the classification of legitimates and illegitimates, far from being arbitrary and capricious, is based upon sound public policy, namely the preservation of the integrity and the rights flowing from legal relationships and the discouraging of promiscuity, bigamy, adultery, illegitimacy and other undesirable consequences of uncontrolled sexual conduct. If a state has the right to enact laws con-

trolling and criminally punishing undesirable sexual conduct and laws prescribing the prerequisites of legal marriages, there should be no doubt that the state has the constitutional power to regulate what rights, if any, should flow from illegitimate relationships.

For the reasons herein stated, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE.

I HEREBY CERTIFY that a copy of the foregoing brief has been served on Leonard Fagot, Esq., and William F. Wessel, Esq., 1605 National Bank of Commerce Building, New Orleans, Louisiana, and on Benjamin E. Smith, Esq., 1006 Baronne Building, New Orleans, Louisiana, by depositing same in the U. S. Mail, postage prepaid, addressed as above, this ... day of February, 1968.

FRANK S. NORMANN.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET. AL.,

On Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

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MRS. MINNIE BRADE GLONA,
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AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY, ET. AL.,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

During oral argument Mr. Justice Black requested counsel to furnish the Court with the law in the various fifty states on inheritable rights by and between natural father and illegitimate child.

As an appendix to this brief, counsel show by a table the treatment afforded illegitimate and natural fathers in the various jurisdictions. The analysis below and the table is made only with reference to intestate decedents. Only a few jurisdictions would prohibit donations by or between illegitimates in testate situations.

Since Louisiana has forced heirship (La. Civ. Code, Art. 1493, 1494), it would be one jurisdiction which would prohibit donations mortis causa to illegitimate children (although the reverse situation would not be true) if there were other legitimate children. See La. Civ. Code, Art. 1483, 1484, 1486.

In approaching this matter, it must be remembered that the general common law rule prohibited inheritance to illegitimate children from either of their natural parents. The converse was also true. Only by statute or the evolution of case law has the rule been changed. As pointed out on page 18 of original brief, all jurisdictions now allow illegitimates and mothers to inherit from each other. See *Note, Illegitimacy,* The Brooklyn L. Rev. 45, 82(1959).

As between father and illegitimate child, the following is determined:

A. Twelve states by statute or by case law or by remaining silent do not allow the father or illegitimate child to inherit from each other.

B. Two states eliminate all distinctions between illegitimate and legitimate children for all purposes and every child is deemed to be the legitimate child of its natural parents.

C. Eight states allow, by statute or case law, illegitimates and fathers to inherit from each other where the father has acknowledged the child. The acknowledgment requirement may be very formal (before wit-

nesses and/or Notary) or informal (such as a holding out of the father as his child).

D. Nineteen states require the acknowledgment by the father as well as a subsequent marriage between the natural parents in order for the father and child to inherit from each other. However, many of these states are silent as to the distribution of the estate if the father fails to do so. This category would then overlap with (A) above.

In most states such intermarriage alone after the birth of the illegitimate will operate so as to legitimate the child making him then on equal footing with legitimate heirs. See e.g. La. Civ. Code, Art. 198.

E. Nine states allow the illegitimate child to inherit from the father who has acknowledged him, but the father has not been given the right of inheritance from the child. The child's estate generally goes to the mother. If she predeceases the father the statutes are generally silent.

Beyond the inheritance laws in the fifty states there are other ways that a child may come into inheritance rights, for example: by adoption or formal legitimation. In reference to Louisiana, this State has a formal means of legitimation, La. Civ. Code, Art. 200, only where there are no other ascendants or descendants.

Legitimation also occurs by the subsequent marriage of the natural parents, La. Civ. Code, Art. 198; and all inheritance rights flow. La. Civ. Code Art. 199.

Louisiana terminology becomes somewhat esoteric at this point — but the State also provides for acknowledgment. This device serves only to convert a *bastard* into a *natural child.* Acknowledgment, however, cannot be made of a child conceived at a time when the natural parents could not, by law, have contracted a valid marriage and have not subsequent to the birth, in fact, contracted one. La. Civ. Code, Art. 204. The methods of acknowledgment are either by notarial act or by the declaration in birth or baptismal certificate.

Needless to say, every mother fulfills the latter requirement of Article 200 since it is she who gives birth and she who fills out the customary certificate.

Acknowledgment serves as a vehicle to obtain inheritance in the same way as does legitimation. A mother or father may inherit from their illegitimate child where they have acknowledged him. La. Civ. Code, Art. 922.

The acknowledged (i.e. natural) child may inherit from the mother only in absence of other descendants of the mother. La. Civ. Code, Art. 918.

The acknowledged child may inherit from the father only in the absence of other descendants, ascendants, collaterals and surviving wife. La. Civ. Code, Art. 919.

Bastards, i.e. unacknowledged illegitimates do not inherit from mother or father. La. Civ. Code Art. 920.

However, the above relates solely to the laws *vis a vis*

inheritance — not that of recovery for wrongful death. They need not be, and are not in Louisiana, dependent upon each other.

The oral argument in this case also unfortunately took the tack quite tangential to the primary issue of the discriminating effect of the operation of La. Civ. Code Art. 2315, the wrongful death statute as to illegitimate children and their parents *vis a vis* that statute. Contrary to the assertions in various of the arguments heard by the Court in these cases, this Court's recognition and disapprobation of the discriminatory effect affects the balance of Louisiana inheritance law — with all its (now changing) history and efficacy — not at all.

This is so because of the point, made repeatedly by defendants that the statute under consideration, Art. 2315, is *sui generis*. Brief on behalf of respondents p. 5, citing *Abraham v. Connecticut Fire Ins. Co.*, 177 So. 2d. 295, (La. App. 1965). Particularly is this so regarding the problem posed this Court. For Article 2315 sets up a law of devolution all its own — it denominates the categories of inheritors; it ranks them; it excludes various of them in favor of others. All of this without reference to nor consistency with all other Louisiana inheritance law. Accordingly, inheritance law is substantially irrelevant except for such other interesting analogies as it may offer. Indeed, as it becomes increasingly liberalized (as it is) towards illegitimates the anomaly arises whereby Art. 2315 occupies a reversed position of being more restrictive than the general inheritance law relating merely to property.

Of course, the Court cannot rectify the unplanned incongruence merely for congruity's sake but the constitutional issue comes particularly into use here. While the inheritance law is, arguably, directed to the establishment of familial relationships and rights, the wrongful death and tort statute unarguably is directed to the compensation by wrongdoers for their wrongful acts solely. This is its sole *raison d'être* and other permissible purposes are to be accomplished by other laws.

The states once did and could, even today presumably, constitutionally not give a right of action for tortious death. Perhaps it could be denied to parents. But once given to parents, the denial to leperous parents, to Communist parents, to alcoholic parents, is unconstitutionally discriminatory. So, we submit is the denial to parents of the illegitimate.

CONCLUSION

The functional tests of equal protection are therefore applicable in this case, and the decision of the Fifth Circuit Court of Appeals should be reversed and the case remanded.

Respectfully submitted:

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CERTIFICATE

A copy of the foregoing supplemental brief has been served on Mr. Frank Normann, Esq., Normann and Normann, attorney for respondents, 1605 Hibernia National Bank Bldg., New Orleans, Louisiana, 70112, by mailing same to him postage prepaid this ____ day of May, 1968.

_____

APPENDIX

RIGHTS OF INHERITANCE-INTESTATE SUCCESSIONS

Illegitimate Children to and from Natural Father

STATE	A	B	C	D	E	STATUTE OR CASES
ALABAMA	X[1]					Code Ala. Tit. 16, §6, 7, 8
ALASKA	X					Alaska Comp. Laws §60-5, 6
ARIZONA		X				A.R.S. §14-206
ARKANSAS	X					Ark. Stats. §61-103
CALIFORNIA			X			Deering's Calif. Prob. Code §255, 256
COLORADO				X		C.R.S. §152-2-8, 11
CONNECTICUT	X					Heath v. White, 5 Conn. 228 (1824) Dickenson's App. 42 Conn. 491 (1875)
DELAWARE	X					13 Del. Code §1301, 2, 3, 4.
FLORIDA					X	F.S.A. §731.29
GEORGIA	X					Ga. Code Ann. §113-904, 905

STATE	A	B	C	D	E.	STATUTE OR CASES
HAWAII	X					Rev. Laws Haw. §330.12
IDAHO					X	Idaho Code §§14-104, 105
ILLINOIS				X		Ill. S. H. A. ch. 3§ 12.
INDIANA			X[2]			Buras Ind. St. §6-207
IOWA			X			Ia. Code Ann §633.222
KANSAS			X[2]			Gen. Stat. 1949 §59-501
KENTUCKY				X		Ky. Rev. Stat §391.090
LOUISIANA				X[3]		La. Civ. Code Art. 918-923
MAINE				X		18 M.R.S.A. §1003
MARYLAND	X					Penman v. Ayers, 221 Md. 154, 156 A. 2d 638
MASSACHUSETTS				X[2]		Mass. Gen. L. C.190§ 5, 6
MICHIGAN				X		M.S.A. §27:3178 (151, 2, 3)
MINNESOTA					X	Minn. S.A. §525.172, 173.
MISSISSIPPI					X	Miss. Stat. §474
MISSOURI				X		V. Mo. Stat Ann §474.060,070
MONTANA			X[4]			R. Code Mont. 391-404, 405
NEBRASKA					X	Neb. R.S. §30-109, 110.
NEVADA			X			Nev. R.S. §134.170, 180
NEW HAMPSHIRE	X					N.H.R.S. §561:4
NEW JERSEY				X		N.J.S.A. 3A:4-7

STATE	A	B	C	D	E	STATUTE OR CASES
NEW MEXICO			X[5]			N.M.S. 29-1-18, 19, 20
NEW YORK	X					N.Y. Est. Powers & Trusts §4-1.
NORTH CAROLINA				X		Gen. Stat. N.C. 29-18, 19
NORTH DAKOTA				X		N.D.C.C. §56-01, -05, 06
OHIO				X		B. Ohio R.C. §2105.17, 18.
OKLAHOMA			X			84 OK. S. Ann. 215, 216
OREGON		X				Ore. R.S. §109.060, 070, §111.231
PENNSYLVANIA				X		20. P.S. 1.7
RHODE ISLAND				X		Gen. L.R.I. §33-1-8
						Scalzi v. Folsom 156 F. Supp. 838
						838 (1957)
SOUTH CAROLINA	X					G.L. So. Car. 19-53
SOUTH DAKOTA					X	S.D.C. 56.0105, 0106
TENNESSEE	X					T.C.A. 31-105, 106, 107, 203.-205.
TEXAS				X		Vernon A.T.S. Probate Code §42.
UTAH					X	U.C.A. 74-4-10, 11
VERMONT				X		14 V.S.A. 553-554.
VIRGINIA				X		Michie Code 1950, §64-5
WASHINGTON					X	R.C.W. 11.04.080, 090
WEST VIRGINIA				X		W.V.C. §4084, 4085
WISCONSIN					X[5]	W.S.A. 237.05, 06
WYOMING				X		W.S.A. §2-44.

CODE:

A. Case law or statute prohibits inheritance to and from father and illegitimate child or else that law is silent and presumably common law rule applies.

B. No distinction between illegitimate and legitimate child exists for any purpose.

C. Inheritance predicated upon acknowledgment of the child by the father. Acknowledgment may be formal or informal from state to state. Inheritance from and to each other.

D. Acknowledgment and subsequent marriage between natural parents required in order for father and child to inherit from each other (note: the failure of the father of this requirement in most states would place the parties in category A above.)

E. The child may inherit from the father who has acknowledged him but not converse. The child's estate generally goes to the mother. The statutes are generally silent where mother predeceases father so apparently the common law rule would obtain.

[1]See *Butler v. Elyton Land Co.*, 84 Ala. 384, 4 So. 675; *Mostilla v. Ash*, 234 Ala. 626, 176 So. 356 (1937); both held that statute created exception only as to mother and therefore inheritance from the father is not punishable. Expressio unius est exclusio alteruis.

[2]Indiana, Kansas and Massachusetts also allow inheritance to and from father where paternity is judicially established. See particular statutes supra.

[3]Louisiana fits somewhat in each category. A more complete analysis of this state has been set out in original brief and the text of this supplemental brief.

[4]The father may not inherit from the illegitimate child in Montana unless he marries the natural mother. His failure to marry her will have the estate of the child devolve upon the mother.

[5]Father inherits from illegitimate child in New Mexico and Wisconsin only where the mother has predeceased him. Inheritable blood also attaches in Wisconsin where paternity has been judicially determined.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING

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SUPREME COURT OF THE UNITED STATES
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AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET AL.,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING

Respondents, American Guarantee and Liability Insurance Company and Henry O. Mac Donell, present this petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

Grounds for Rehearing

The Court erred:

1) in holding the Louisiana Wrongful Death Statute unconstitutional, while simultaneously holding that such statute confers a cause of action on the mother of an illegitimate child;

2) in failing to recognize the basic distinction between the *Levy* and *Glona* cases;

3) in holding that the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution prohibits the state from limiting recovery for wrongful death to those parents who have legitimated their illegitimate offspring; and

4) in finding that Louisiana has followed an inconsistent course in its sanctions against illegitimacy.

ARGUMENT

While conceding that this Court has the power to hold a state statute unconstitutional, respondents challenge the Court's action in re-writing the Louisiana Wrongful Death Statute so as to create a cause of action in favor of the petitioners in the *Glona* and *Levy* cases. Petitioners' attack on the constitutionality of the Wrongful Death Statute was, from its very inception, illogical, as they were seeking rights under the very statute which they challenged as unconstitutional. This incongruous position was clearly recognized in the case of *Benjamin v. Hardware Mutual Casualty Co.*, 244 F.S. 652 (W.D. La., 1965), wherein the Court held as follows:

> "In addition to the arguments as to the status of these minors, plaintiffs urge that Article 2315 of the Civil Code should be declared unconstitutional inasmuch as it discriminates against illegitimate children and does not af-

> ford them an opportunity to sue for the wrongful death of their parent, while it does afford this right to legitimate children. Without discussing the obvious error in this position, suffice it to say that this statute is not under attack in this proceeding. If by some legal alchemy plaintiffs have developed a new field in the matter of civil rights litigation, it should be properly raised in a suit filed for that purpose."

Thus, if the Court adheres to its original judgment that Article 2315 is unconstitutional, then there is no valid Louisiana Wrongful Death Statute at the present time, and no one, legitimate or illegitimate, has a cause of action, until such time as the Louisiana legislature enacts a new statute. This Court does not have the constitutional power to enact state laws, merely to set them aside if they violate the Equal Protection Clause of the Fourteenth Amendment.

The majority opinion seems to be more concerned about the fact that, unless recovery is granted to petitioners in these two consolidated cases, the tortfeasors will "go free" or receive "a windfall" than about the legal issues involved and the far-reaching consequences of these decisions, which, in effect, prohibit the State from enacting any laws which confer greater rights on legitimate relations than on illegitimate ones.

If the alleged tortfeasor in the *Levy* case "goes free", it is because the party entitled to bring a suit, the mother of the decedent, failed to exercise her rights. If the alleged tortfeasor in the *Glona* case "goes free",

it is because petitioner, although herself now a legal wife and enjoying all of the benefits resulting from such status, has withheld legitimate status from her son for nineteen years.[1]

In *Bell v. Tug Shrike*, 332 F.2d 330 (4th Cir., 1964), cert. den. 379 U.S. 844, the tortfeasor went free because the plaintiff, although dependent upon the decedent could not qualify as his legal wife merely because she failed to go through another marriage ceremony following the divorce of the decedent from his former wife.[2]

In many jurisdictions, a cause of action for wrongful death will abate unless the decedent is survived by the beneficiaries designated by statute. Thus, the tortfeasor "goes free." In short, the fact that in isolated instances a tortfeasor may go free is no legal justification for changing an otherwise valid and constitutional law.

The Court refers to the Louisiana Wrongful Death Statute, Article 2315 of the Louisiana Civil Code, as a law dealing with "sin."[3] While, of necessity, any law

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[1]App. 5, Article IV of the complaint.

[2]In the *Bell* case, plaintiff was the de facto, although not the legal wife of the decedent. In this case, petitioner is the de facto or biological, but not the legal mother of the decedent. Thus, from a legal viewpoint no distinction can be made between the two cases.

[3]The reference to "sin" is apparently based on the language in the Court of Appeal's opinion in the *Levy* case to the effect that "Denying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wed-

granting rights to legitimate relations withholds such rights from illegitimates, and, to that extent, indirectly or remotely deals with "sin", the real purpose for granting greater rights to legitimates is to encourage marriage, to protect the legitimate family unit and the property rights flowing therefrom. Some may argue that marriage is not a desirable state and should not be accorded the protection and, indeed, the encouragement by the State, but as late as 1967 this Court stated in *Loving v. Commonwealth of Virginia*, 87 S.Ct. 1817 at 1824 that:

> "Marriage is one of the 'basic civil rights of man' *fundamental to our very existence and survival.*"
>
> (Emphasis supplied)

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lock." It should be noted that the *Levy* opinion did not emanate from the highest court of the State of Louisiana, but from a three-member panel of an intermediate court, and represents the views of only one judge, apparently concurred in by the other two members of the panel. Thus, the pronouncement is not in any way conclusive as to the purpose of and reason for the law under attack herein.

As was forcefully stated in the Brief filed by the Attorney General of the State of Louisiana, p. 4, "Louisiana's purposes in granting greater rights to legitimates than to illegitimates are not the punishment of illegitimates and not even the discrimination against immorality in sexual behavior. Louisiana's purposes in the area are positive ones; the *encouragement* of marriage as one of the most important institutions known to law, the preservation of the legitimate family as the preferred environment for socializing the child, and the preservation of the security and certainty of property rights linked with family status."

As long as this Court is committed to the principle, that marriage is "fundamental to our very existence and survival", it is only logical, if not mandatory, that marriage be encouraged by the enactment of laws granting superior rights to legitimate family relations and protecting these rights against the claims of illegitimates. Needless to say, the protection of legal marriages and the creation and preservation of property rights linked with family status are certainly a strong inducement to enter into legitimate marriages. It is common knowledge that the proportion of marriages to avoid illegitimacy of a child, already conceived at time of marriage, is increasing.

By holding that under our constitutional regime all citizens have to enjoy correlative rights, this Court has not only extinguished all classifications between legitimates and illegitimates for all purposes, but, as poignantly observed in the dissenting opinion,[4] has abolished the rights of legitimates under certain conditions.

Under the rationale of the majority opinion, no state will any longer be permitted to draw any distinction between legitimates and illegitimates, be it in the area of Wrongful Death or Inheritance. All children, legitimate or illegitimate, will be entitled to equal rights in the estate of their father and mother. All children,

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[4] "Under the Court's opinion, the right of legitimate and perhaps dependent parents to sue will henceforth be cut off by the mere existence of an illegitimate child, though the child be a self-supporting adult, and though the child elect not to sue." Dissenting opinion, p. 3, footnote 5.

legitimate or illegitimate, will be entitled to sue for the Wrongful Death of either father or mother.[5] The recognition of legitimate and illegitimate children on an equal basis will reduce recovery by the legitimates in all cases where only a limited fund is available for the satisfaction of judgment and in all cases where the total recovery for wrongful death is limited by statute. The recognition of the biological parents on an equal basis with adoptive parents, will impair the rights of those who have cared for and nurtured and legitimated the child, and will award those who, perhaps by accident, fathered and conceived a child, but did not see fit to legitimate the child in the eyes of the law and society.

Considering the biological facts of conception and the difficulty to disprove paternity, it is almost inconceivable that anyone would advocate that the bereaved widow and legitimate children be subjected to the claims of alleged illegitimates who were never formally acknowledged by the decedent. Every illegitimate child has a biological father, but how many know their father?

In the final analysis, the issue before the Court in the Glona case are not unjust enrichment, not love, affection, dependency and the like, but as indicated in the dissenting opinion simply this:

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[5]At present, an illegitimate child may not recover for the wrongful death of his father in Louisiana, or generally in other states. 72ALR 2d 1235, 1239-42.

> If the State has the right to prescribe the formalities of marriage and refuse to recognize persons as husband and wife, unless they comply with such formalities, why does not the state have the concomitant right to require that the parent of an illegitimate child comply with the formalities for legitimation before such parent will be permitted to assert an action for the wrongful death of the child?

There can be little question that the children in the *Levy* case had no control over their status. Likewise, there is little question that the social stigma imposed upon an illegitimate child has no justification in fact, law or in equity. However, the same reasoning does not apply to either the father or the mother of an illegitimate child, as it is solely in the power, and within the free exercise of their volition and discretion to legitimate their illegitimate offspring. The State has not barred either the father or the mother of an illegitimate child from suing for the wrongful death. The State has merely required that before a parent, be it father or mother, can assert any rights for the Wrongful Death of an alleged child, he or she has to legitimate the child and formally recognize him. This is no more nor less than the requirement that people go through a marriage ceremony before they will be recognized as legal husband and wife, which has always been conceded to be within the State's power.

Petitioner's argument that there was no need to legitimate the child because, under Texas law, the mother may inherit from and sue for the death of an

illegitimate child, strikes us as shocking. Presumably, the purpose of legitimation is the removal of the social stigma and any legal disadvantages to the child and not the personal gain of the parent.

The majority's further statement that "Louisiana follows a *curious* course in its sanctions against illegitimacy" is apparently based upon a misconception of the rationale of the authorities cited in support of such statement. These authorities will be examined in the order cited by the Court:

1) "A common-law wife is allowed to sue under the Louisiana Wrongful Death Statute." The statement is only partially correct and, therefore, misleading. Louisiana does not permit its citizens to enter into common-law marriages, but considers such marriages as being nothing but a state of concubinage. *Succession of Marinoni,* 177 La. 592, 148 So. 888 (1933). However, under the Full Faith and Credit Clause of the United States Constitution Louisiana is required to and will recognize a common-law marriage if such marriage is a valid legal marriage in the State wherein it was consummated. Were it otherwise, a legal wife and legitimate children under Florida law would be branded concubine and illegitimates, respectively, if they moved to the State of Louisiana. Once the rationale of this law is understood, it is obvious that it is not the least *curious.*

2) "When a married woman gives birth to an illegitimate child, he is, with a few exceptions, conclusively presumed to be legitimate." This is correct. However,

before this law can be considered as curious, the reason therefor has to be examined. Surely, it cannot be presumed that the State condones the immoral conduct of a married woman any more than that of an unmarried woman. The real reason is set forth in *Lewis v. Powell,* 178 So.2d 769 (2nd Cir., 1965) as follows:

> "The policy so established has for its purpose the protection of innocent children born during marriage against scandalous attacks upon their paternity, inter alia, by the husband of the mother who may be seeking to avoid his obligations, or by others unscrupulously claiming the estate of the husband after death."

3) "Louisiana makes no distinction between legitimate children and illegitimate children where incest is concerned." True, no state does. Incest, by the very definition of the crime, is an act of sexual intercourse punishable by virtue of the relationship of the parties, either by consanguinity or by affinity.[6] Aside from any moral considerations, incestuous acts are undesirable because of the well-known adverse genetic effects on the possible offspring of such relationship. Thus, "the propinquity of kinship requisite to constitute the offense is generally declared to be that within which the parties are forbidden to marry."[7]

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[6]27 Am. Jur. "Incest", § 3, p. 289.
[7]See Footnote 6.

4) "A mother may inherit from an illegitimate child whom she has acknowledged and vice versa. If the illegitimate son had a horse that was killed by the defendant and then died himself, his mother would have a right to sue for the loss of that property." This is only partially correct. Absent legal heirs, such as wife and children, a natural mother inherits from the illegitimate child if she has "formally" acknowledged the child during his lifetime. *Succession of Lacosst,* 142 La. 673, 77 So. 497 (1918). Conversely, an illegitimate child may inherit from his mother even though he is only "informally" acknowledged. Petitioner did not "formally" acknowledge her son. Therefore, petitioner would *not* have the right to sue for the loss of the illegitimate son's horse. The foregoing shows that Louisiana has been consistent in its sanctions against illegitimacy. The required formalities have to be complied with irrespective of whether the mother is suing for the wrongful death of her illegitimate child or for the loss of property belonging to her deceased illegitimate child.

5) "If the illegitimate son were killed in an industrial accident at his place of employment, the mother would be eligible for recovery under the Louisiana Workmen's Compensation Act, if she were a dependent of his." This is partially correct. If the illegitimate leaves no surviving wife and minor children, the mother may recover workmen's compensation benefits if she is a "dependent" within the meaning of the statute. It should be noted that a person to be considered a "dependent" of a deceased employee need not be a blood relative nor bear to him the relationship of husband or widow

or lineal descendent or ascendant, brother, sister or child. Thus, a total stranger, not related to the employee by marriage or blood, may recover as a "dependent" if, in fact, depended upon the decedent for his support. *Patin v. T. L. James & Co.*, 218 La. 949, 51 So.2d 586 (1951). Again, this result under the Louisiana Workmen's Compensation Act does not betray any inconsistency on the part of the legislature, but merely accomplishes the purpose of the compensation act, which is considered remedial legislation, to be liberally construed in favor of its beneficiaries. *Archibald v. Employers' Liability Assur. Corporation*, 202 La. 89, 11 So.2d 492 (1942).

The majority opinion recognized that "opening the courts to suit of this kind may conceivably be a temptation to some to assert motherhood fraudulently, however, it failed to recognize the much graver danger that suits of this kind will be a temptation to some to assert fatherhood fraudulently and, even worse, to some to assert that they are the offspring of a decedent male, leaving the decedent's legitimate widow and children completely defenseless to rebut such fraudulent claims of alleged paternity.[8]

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[8]Under Louisiana law, legitimate children are forced heirs of their parents. They cannot be disinherited except for the causes listed in Article 1621 of the Louisiana Civil Code, which are as follows:

"1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent; but a mere threat is not sufficient.

2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.

3. If the child has attempted to take the life of either parent.

In conclusion, we submit that the Wrongful Death Statute has to be considered in the overall context of the Louisiana legal system, which is designed to encourage the formation of legal relationships, to grant rights based upon such legal relationships and to withhold the rights from those who fail to formalize their relations. Louisiana has in no way discriminated against the parents of illegitimate children and has not denied them the right to sue for the wrongful death of their children. The State of Louisiana only requires that a parent legitimate the child during the child's lifetime. This requirement does not evidence any discrimination against illegitimates but, on the contrary is conducive to fostering legitimation by making it advantageous to the parent to legitimate his or her illegitimate offspring.

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4. If the child has accused a parent of any capital crime, except, however, that of high treason.
5. If the child has refused sustenance to a parent, having means to afford it.
6. If the child has neglected to take care of a parent become insane.
7. If the child refused to ransom them, when detained in captivity.
8. If the child used any act of violence or coercion to hinder a parent from making a will.
9. If the child [being a major] has refused to become security for a parent, having the means, in order to take him out of prison.
10. If the son or daughter, being a minor, marries without the consent of his or her parents."

If illegitimate children are entitled to the same rights as legitimate children, then they are forced heirs and cannot be disinherited except for the causes mentioned in Article 1621. Consequently, all Louisiana succession proceedings, whether testate or intestate, are henceforth subject to attack by the claims of illegitimate children.

Respondents submit that the solution to the problem of weighing the rights of the legitimates and illegitimates is not to abolish the classification, as this Court has done, but to encourage the establishment of legitimate relationships as the State of Louisiana has done in this instance when requiring that a parent legitimate his illegitimate offspring in order to gain rights to sue for the wrongful death of the child and to be recognized as an heir of the child.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that, upon further consideration, the judgment of the U.S. Court of Appeals for the Fifth Circuit be re-instated and made the final judgment of this Court.

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CERTIFICATE OF COUNSEL

I, David R. Normann, counsel for the above-named respondents do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

_____

David R. Normann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been served on Leonard Fagot, Esq., and William F. Wessel, Esq., 1605 National Bank of Commerce Building, New Orleans, Louisiana, and on Benjamin E. Smith, Esq., 1006 Baronne Building, New Orleans, Louisiana, by depositing same in the U. S. Mail, postage prepaid, addressed as above, this ____ day of June, 1968.

David R. Normann.

SUPREME COURT OF THE UNITED STATES

No. 639.—October Term, 1967.

Minnie Brade Glona, Petitioner, v. American Guarantee & Liability Insurance Company et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 20, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

This suit was brought in the Federal District Court under the head of diversity jurisdiction to recover for a wrongful death suffered in an automobile accident in Louisiana. The plaintiff, a Texas domiciliary, was the mother of the victim, her illegitimate son. Had the Texas wrongful death statute [1] been applicable, it would, as construed, have authorized the action.[2] But summary judgment was granted on the ground that under Louisiana law [3] the mother had no right of action for the death of her illegitimate son. The Court of Appeals affirmed, rejecting the claim that the discrimination vio-

[1] Tex. Rev. Civ. Stat. § 4675.

[2] The Court of Appeals so indicated in this case. 379 F. 2d, at 546, n. 2. See *Galveston, H. & S. A. R. Co.* v. *Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705 (1907).

[3] The applicable statutory provision is set out in *Levy* v. *Louisiana*, *ante*, at —, n. 1. As the Court of Appeals noted, Article 2315 of the Louisiana Civil Code, providing for wrongful death recovery, gives a cause of action to "the surviving father and mother of the deceased, or either of them. . . ." The statute does not state "legitimate" father or "legitimate" mother, but the Louisiana courts have held that decedent must be legitimate in order for an ascendant or sibling to recover for his death. *Sesostris Youchican* v. *Texas & P. R. Co.*, 147 La. 1080, 86 So. 551 (1920); *Buie* v. *Hester*, 147 So. 2d 733 (La. Ct. App. 1962). See also *Green* v. *New Orleans, S. & G. I. R. Co.*, 141 La. 120, 74 So. 717 (1917); *Jackson* v. *Lindlom*, 84 So. 2d 101 (La. Ct. App. 1955). See also *Vaughn* v. *Dalton-Lard Lumber Co.*, 119 La. 61, 43 So. 926 (1907).

lated the Equal Protection Clause of the Fourteenth Amendment. 379 F. 2d 545. We granted the petition for a writ of certiorari, 389 U. S. 969, in order to hear the case along with *Levy* v. *Louisiana, ante,* p. —.

Louisiana follows a curious course in its sanctions against illegitimacy. A common-law wife is allowed to sue under the Louisiana wrongful death statute.[4] When a married woman gives birth to an illegitimate child, he is, with a few exceptions, conclusively presumed to be legitimate.[5] Louisiana makes no distinction between legitimate children and illegitimate chilrden where incest is concerned.[6] A mother may inherit from an illegitimate child whom she has acknowledged and vice versa.[7] If the illegitimate son had a horse that was killed by the defendant and then died himself, his mother would have a right to sue for the loss of that property.[8] If the illegitimate son were killed in an industrial accident at his place of employment, the mother would be eligible for recovery under the Louisiana Workmen's Compensation Act, if she were a dependant of his.[9] Yet it is argued that since the legislature is dealiing with "sin," it can deal with it selectively and is not compelled to adopt comprehensive or even consistent measures. See *McLaughlin* v. *Florida,* 379 U. S. 184, 191. In this sense the present case is different from the *Levy* case, where by

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[4] *Chivers* v. *Couch Motor Lines,* 159 So. 2d 544 (La. Ct. App. 1964).

[5] La. Civ. Code Ann. Art. 184. See *Lambert* v. *Lambert,* 164 So. 2d 661 (La. Ct. App. 1964); *Harris* v. *Illinois Central R. Co.,* 220 F. 2d 134 (C. A. 5th Cir. 1955); cf. *Lewis* v. *Powell,* 178 So. 2d 769 (La. Ct. App. 1965).

[6] La. Rev. Stat. Ann. § 14:78.

[7] La. Civ. Code Ann. Arts. 918, 922.

[8] La. Civ. Code Ann. Arts. 2315, 922.

[9] La. Rev. Stat. Ann. §§ 23:1231, 1252, 1253; *Thompson* v. *Vestal Lbr. & Mfg. Co.,* 208 La. 83, 119, 22 So. 2d 842 (1945); see Note, 20 Tulane L. Rev. 145 (1945).

mere accident of birth the innocent, although illegitimate, child was made a "nonperson" by the legislature, when it came to recovery of damages for the wrongful death of his mother.

Yet we see no possible rational basis (*Morey* v. *Doud*, 354 U. S. 457, 465–466) for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told, the historic reason for the creation of the disability. To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.

Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock.

Reversed.